ID-DRITT

LAW JOURNAL

VOLUME XVII
1999

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Errata Corrige

1. Running heads on left hand pages should read **Vol. XVII** and not as printed.
2. Page 49, line 1 should read *"…the Fifth President of Malta,…"*

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Id-Dritt Law Journal
Editorial Board

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Editorial

This issue of *Id-Dritt Law Journal* is important for a number of reasons. Firstly, it represents a comeback of *Id-Dritt* since its last publication in 1991. Secondly, owing to the sad but hopefully temporary demise of *De Jure*, the law journal published by the Chamber of Advocates, *Id-Dritt* has found itself remaining the only local legal journal on the market at present. Therefore it was of utmost importance to re-launch this publication, owing not so much to the fact that it is the Law Society's main source of income, but also to its importance as a law journal in the local legal environment.

The Editorial board, in its collection of articles, has attempted to cover a wide range of subjects, some of which deal with hot topical issues and others which deal with specific questions of law. Since it is the intention of the Editorial Board to issue *Id-Dritt* on a bi-annual basis for the time being, each issue will be of considerable length and will include a large number of articles. Therefore our doors are always open to anyone who would care to contribute. Hopefully, our initiative to relaunch this publication will be upheld, strengthened and developed by all future Law Society committees since we feel that this publication, now nearly thirty years old, has taken its place as a minor but, nevertheless important institution within both university and professional legal circles in Malta.

On a different note, the Editorial Board of *Id-Dritt* and the Law Society Committee would like to extend their sympathy to the family of the late Prof. J. Micallef on the sad occasion of his passing away. Prof. Micallef was one of our Honorary Presidents and a lecturer in the Faculty of Laws for three deacdes. He had become somewhat of an institution within the legal world because of his dedication and commitment to his students and the profession as a whole. He will be sorely missed.

I must also take this opportunity to congratulate, on behalf of the Editorial Board and the Law Society Committee, HE Prof. Guido De Marco, one of our Honorary Presidents, on his appointment as President of the Republic of Malta. Prof. De Marco has always encouraged the Law Society in all its activities and has been a keen follower of the progress of the re-launch of *Id-Dritt* throughout its development.

On behalf of the Editorial Board, I would like to thank the Directors and Staff of Standard Publications Ltd., particularly Mr Wilfred Kenely, without whose help this project might have been rendered impossible. I would also like to thank all contributors to the publication who showed enthusiasm and interest in the Law Journal and many of whom had the opportunity of participating in the production of past issues whilst they were Law Students themselves. Last but certainly not least I would like to thank the Law Society Committee of 1998 who gave me the opportunity of editing this issue of the journal as well as the members of the Editorial Board whose hard work and perseverance in the difficult task of article-collecting ensured the successful outcome of this issue of *Id-Dritt* Law Journal.

George Said
Editor

DR JOANNA DRAKE

THE EXHAUSTION PRINCIPLE COMES IN THE WAY OF PARALLEL IMPORTERS

Some comments on the *Silhouette* Judgment (delivered by the European Court of Justice on the 16 July 1998)

1. The facts in the *Silhouette* case

An Austrian Court, seized with a dispute between two Austrian companies, Silhouette and Hartlauer, sought the assistance of the European Court of Justice in Luxembourg, through a preliminary reference. Silhouette, a manufacturer of top of the range branded spectacles sold its product to a company established in Bulgaria on condition that they would not be resold elsewhere, including the European Economic Area. Hartlauer, a discount outlet in Austria, sought to obtain Silhouette spectacles from the brand owner, but was turned down because of the down-market image of the outlet. On being refused supply, Hartlauer succeeded in sourcing genuine Silhouette spectacles from Bulgaria on the grey market and imported them into Austria for resale from his discount outlet. In an effort to protect the image of the spectacles, Silhouette sought an injunction before the Austrian courts to stop Hartlauer from offering the spectacles for sale in Austria.

Since the matter turned on the interpretation of a provision of the European TradeMark Directive, the Austrian Court referred a question to the European Court of Justice, in virtue of the preliminary reference procedure under Article 177 of the EC Treaty.

2. The points of law at issue

Silhouettes' claim was based specifically on Article 7(1) of the European Trade Mark Directive which lays down the so-called principle of exhaustion, that is,

a trade mark owner loses his right to prohibit the resale in the European Union of his branded goods as soon as he himself sells of consents to the sale of those goods anywhere in the European Economic Area territory. The EU exhaustion principle has been a firmly established principle in EU law regulating intellectual property rights and the Directive in question simply crystallises this well-known doctrine.

However, the set of circumstances before the Austrian judge required him to go beyond the state of evolution of the exhaustion principle as it stood then since it involved a country which was not within EEA territory, namely Bulgaria. In other words, neither the Directive nor established case-law had a ready answer to the question of whether the trade mark owner exhausts his right to prohibit resale of his branded goods in the EU if he sells or consents to the sale of the goods in a country outside the EEA. Hence, the need for clarification on whether the "international exhaustion" principle applied. This was the first point of law at issue.

A second, though, supplementary point, related to whether Member States were precluded from adopting the wider rule of international exhaustion in their national legislation implementing the Community Directive. [Member States are required to implement the provisions of European Directives by enacting national legislation in order for them to be effective in their territory]. In the pre-Silhouette scenario there were at least, three ways in which Member States dealt with the situation. Denmark and the U.K. simply reproduced the language of the Directive about exhaustion in their national legislation leaving the national courts to interpret the wording. France and the Benelux countries specifically outlawed the application of the international exhaustion principle. A third group of countries, including Sweden, the national law, which already provided for international exhaustion, was left intact by national legislation implementing the Directive.

3. The judgment of the European Court of Justice

The Court settled these two points in the following manner:

a) Regarding *international exhaustion*, it clarified that under the Directive, exhaustion only occurs when the goods have been placed on the EEA market by the trade mark owner or with his consent. Thus, where the goods are placed

on the market in a country outside the EEA, exhaustion does not apply, so that the trade mark owner can legitimately stop the resale of the goods into the EU (provided that he has not consented to their being sold in the EEA). International exhaustion, therefore, did NOT apply in the EU.

b) Regarding *adoption of international exhaustion by the Member States in their national legislation*, the Court ruled that Member States were precluded from adopting such a principle since the resulting discrepancies between the Member States would create barriers to the free movement of goods and services within the EU internal market. Therefore, all EU countries must now apply only a Community exhaustion principle and Member States were required to adjust their legislation accordingly. The Court specified that the EU would only be able to extend the exhaustion principle to products put on the market outside the EEA through international reciprocal agreements. *Meanwhile, the position is that brand owners are entitled to stop genuine branded products from being imported into the EU from any country outside the EEA, provided that neither the brand owner nor any licensee had consented to such import.*

4. Comments

This judgment has been the subject of controversy in the press and in academic writings. Most significantly, it provoked the wrath of large supermarkets and consumer associations in the U.K., which were in the middle of waging a "brand war" against the high prices charged for branded goods. By and large this judgment has been denounced as a step backwards in terms of consumer rights as it severely limits the ability of grey importers to source consignments of branded goods from third countries (outside the EEA area, notably the U.S.) without the consent of the relevant brand owners or licensees.

To these comments, I would like to add a few observations about the Court's ruling.

i. *Confirmation that the doctrine of exhaustion has territorial limits*

The Court judgment leaves no doubt as to the correct interpretation of Article 7 of the Community Directive regulating trademarks, namely that as long as branded goods were put on the market **outside the European Economic Area**,

even if this was done with the consent of the owner of the mark or by third parties with his consent, there is no exhaustion of the trademark rights. In other words, a trademark owner (of owner of a design, as in this case) may invoke his industrial property rights to prohibit the importation and sale of branded goods in the EEA if these goods were sourced outside EEA.

The implication of these parameters may be appreciated if one contrasts this ruling with the situation obtaining INSIDE the external borders of the internal market. Here, parallel imports are fiercely protected and no rights deriving from intellectual property could come in the way of the free importation of trademarked or designer goods from other Member States even if these were obtained from third parties and not directly from the owner of the mark. All this is done in the name of guaranteeing so-called intra-brand competition (competition between goods of the same brand-name). In the internal market scenario where the overriding objective of competition is considered to be the market integration goal, the doctrine of exhaustion was the Court's response to the need of striking a balance between, on the one hand, discouraging the fragmentation of the single market along national borders through the use of national industrial property rights and on the other hand, guaranteeing rewards for innovation.

In plainer language, intellectual property rights may not be successfully invoked to impede trade of goods originating in the Community, as long as the mark has been exhausted there, yet on the other hand they may be used to stop authentic goods sourced in third countries. Does this perhaps substantiate the view that the EU is a Fortress Europe? In other words, are intellectual property rights being deployed as instruments in restraint of trade with third countries? It seems that the Union is keen on discriminating simply on the basis of origin and it is deploying intellectual property rights to achieve its objective. The irony in all this is that, in my opinion, it is Community industry itself which is being kept out in the cold!

ii. *Restriction of price competition in the European market on designer goods*

In innumerable judgments of the Court of Justice and decisions of the European Commission in competition law cases, the importance of the guaranteed presence of price competition on the European market was emphasized. In fact selective distribution systems where luxury brand owners would attempt to secure price levels as well as an exclusive image for their brands,

would be slammed as illegal if it transpired that these networks were used to discriminate against and keep out price discounters. *Some* degree of price competition is crucial for effective competition in the relevant market.

Again, this judgment seems to be imposing territorial limits to this European creed. This judgment has virtually eliminated the possibility of having ANY kind of price competition in designer brands in Europe since price discounters have now been discouraged to tap cheaper designer goods which are invariably sourced outside the common market. The inferences could be two:

a. Price competition in the internal market, according to the Court, is positive only when this originates from within the Community (or EEA) - (This of course is an aberration since you cannot have effective price competition if you put territorial limits on where this should be coming from. Is this policy conducive to the enhancement of consumer welfare, which should be the primary objective of competition law ?)

b. The Court may be signaling that, rather than relying on low-priced grey imports sourced from outside the Community to guarantee a degree of price competition in the designer goods trade in the EU, manufacturers should instead seek to loosen their stranglehold on retailers by allowing them more freedom to set their own price levels. Hence an increase in price competition. If this is a correct reading, this is not a bad proposition at all.

It is hoped that the latter observation is the correct one and that the Court of Justice will, in the near future, have the opportunity to develop this trend in its pronouncements. If, on the contrary, the former observation is true, then I fear that this judgment goes a long way in cushioning European industry from pressures of competition coming from outside its external borders. This is bad news both for the European consumer as well as for European industry.

iii. *Manufacturers' power over sales chain set to increase.*

The expected aftermath of this judgment is that manufacturers or owners of brand names will tighten their control (thus restricting competition) over the price-setting and the location and methods of selling of their retailers. Moreover, this judgment should be analysed against the background of recent developments (Commission Communication on the application of EU competition rules to vertical restraints, published on 30 September 1998, IP 98/853) whereby

the Commission, in a radical review of its traditional policy on vertical restraints, has adopted a new approach. From now onwards exclusivity deals that fall below certain market thresholds are not deemed to be a threat to competition and therefore are able to avoid the scrutiny of the Commission watchdog for competition, namely DG IV. These two developments have sent shivers down the spines of grey importers (typically large supermarkets) as they claim that the net effect will be the tightening of the manufacturers' powers over them.

Should a distributor of a luxury branded product in a selective distribution network not be able to set his/her own price levels as long as the exclusive image of the brand name and its reputation are preserved? Should he/she not be able to source cheaper (authentic) versions of the goods in question from a third country if this in effect results in a better promotion of the goods with his/her customers who are willing to pay less for the good in question - perhaps less than what other customers in other areas of the common market are prepared to pay? Is not this what diversity in the single market is all about? After all, it is an undeniable fact that not one single good is marked with the same price throughout the single market, as it has already become more evident for all thanks to improved price transparency throughout the EU following the launch of the Euro on January 1st of this year. Effective competition is not about uniform pricing throughout the Community but it is all about setting the right price for the right market or part thereof.

I fear that this judgment is lending support to the idea that price competition should be sacrificed on the altar of preserving the image of a designer good through the maintenance of high pricing. If this idea is allowed to run wild, consumer welfare will be seriously undermined.

iv. *What concept of competition is this judgment promoting?*

This latter observation brings me to this broader issue. Is this judgment promoting the objective of maximising consumer welfare through efficiency? Or is it perhaps giving more importance to the objective of market integration, in the sense that competition law is used as an instrument of consolidating the internal market as one unified whole by removing all internal barriers to trade but reinforcing the external borders?

A restriction on price competition is definitely not promoting consumer wel-

fare in the branded goods market. It is also doubtful how far this restriction may be justified as being necessary to safeguard innovation. In other words, what should prevail, the consumer's right to have real price competition no matter the origin of the goods or the innovator's right to protect his/her creation ? Surely this is a matter of proportionality - finding the right balance. Or perhaps this principle too has its territorial restrictions?

5. A ray of hope?

There is one saving feature to this judgment: the Court has clearly left open the possibility of future negotiations with third countries with a view of extending the EU exhaustion principle to one of "international exhaustion". As is customary in all international trade negotiations, however, this development will only take place on the basis of reciprocity - that is, only in so far as the third countries concerned are able and willing to offer the same openness in their home markets. A long and winding road is clearly ahead, if at all.

The Hon. Mr Justice

Vincent A. De Gaetano

The Doctor In Court - An Overview[1]

When, about two weeks ago, I was asked by my friend Dr. Mario Scerri to address you, my first reaction was to say politely "no thank you". What can a lawyer say which can be of interest to medical people gathered to discuss topics in the field of forensic medicine? But then I thought of the many close encounters I have had, both as a prosecutor and now as a judge, with doctors in the court room, encounters that have been in some cases rewarding, in others disappointing, in some cases positively entertaining, in others nightmarish. What is that makes the doctor's role in court, particularly in criminal proceedings, so captivating for the media, so much discussed and criticised by lawyers, and so very often disliked by doctors themselves? After all the doctor in court — unless he happens to be the accused or unless he is giving evidence on something totally unrelated to his medical practice — should be saying in court very much the same thing he would have said in a case conference with colleagues or in a written report submitted to a patient or to whoever requests such a report (e.g. an insurance company). The answer is both simple and complicated. The simple answer is that the moment a doctor is transposed from a purely medical setting into a legal or courtroom setting, the "rules of the game" are changed. The complicated answer is linked to the more or less complex rules of the adversarial legal system, to which are added what to many may seem as quaintnesses and endemic inconveniences peculiar to the Maltese legal system.

Let me try to explain, at the same time promising you that I will keep my intervention as brief as possible.

As a rule no one likes to be summoned to give evidence in court. This is, of course, true of the housewife as of the neurosurgeon, with the difference that the latter's agenda for the particular morning would have been prepared weeks

or months in advance and upsetting it could in practice mean serious inconvenience to many third parties unconnected with the court proceedings. The present position in Malta is that it is left up to individual judges and magistrates to adopt measures to ensure as far as possible that doctors summoned to give evidence in court do not waste hours in the corridors of the court building before they are called to the witness stand. In civil proceedings before the Superior Courts the problem is to a large extent obviated by the fact that most cases are heard by appointment, which means that a particular time of the morning or (with some judges) of the afternoon is set for a particular case. The witness or witnesses are thus also summoned for a particular time rather than asked to be in court from nine in the morning. The situation is different, however, before the Magistrates' Courts in criminal proceedings and before the Court of Criminal Appeal in its inferior jurisdiction. Here the sheer number of cases makes it impractical to have them heard by appointment: they are all set for hearing at nine in the morning, and then the judge or magistrate proceeds by order according to the list. Even so measures may be, and in fact have been, adopted to reduce the time a doctor spends in court. Soon after my appointment to the Bench in March of 1994, it was agreed between Mr. Justice Victor Caruana Colombo and myself[2] to send a memo to the Chief Government Medical Officer asking him to advise all doctors — whether in Government service or not and whether consultants or GP's — that whenever they were summoned to give evidence in their professional capacity before the Court of Criminal Appeal, they could, immediately upon arriving in court at nine, inform one of the court marshals, who would then inform the presiding judge, and the case in which that doctor had to give evidence would then be heard before other cases. If the doctor could not be in court at nine, he was advised to inform the Deputy Registrar by phone, giving either the time when he would be available that morning or, if it was impossible for him to make it that day, to indicate another day and/or time. I must say that this arrangement has worked to the satisfaction not only of doctors but also of the parties to the case, because if the court is informed that a doctor cannot appear on a particular day, the case is immediately adjourned.

The situation tends to be a bit different before the Criminal Court, that is in trials by jury. Here it is up to prosecuting counsel to decide at what stage to produce the witness who happens to be a doctor. If the doctor is being produced as a witness for the defence, it would be up to defence counsel to decide at what stage to produce him. Although every effort is made by counsel to accommodate the needs of doctors, in practice it is not possible for them to

give other than a general idea of when the particular doctor will be called to give evidence, for example, in the morning of a given day or in the afternoon. Doctors must appreciate that although they may be scheduled to give evidence at a particular time, that schedule may be totally upset by an unexpectedly long cross-examination of a previous witness or witnesses, or by some unexpected point of law being raised and requiring lengthy oral submissions and a court ruling.

More recently even the legislator has intervened in an attempt to cut down on the time spent by doctors in court. By an amendment introduced last year[3] to section 646 of the Criminal Code, medical certificates are now admissible as evidence and are, until the contrary is proved, evidence of their contents without the need of the person issuing them having to be summoned to give evidence at the trial. For a certificate to be so admissible certain conditions must be satisfied. (1) the certificate must be issued by a registered medical practitioner or a registered dental surgeon; (2) it must concern his examination of a person (whether alive or dead) or a bodily harm suffered by, or a physical or mental infirmity afflicting, such person; (3) it must bear the clearly legible stamp of the medical practitioner or dental surgeon, showing his name, professional qualifications, expertise and address; and (4) last but not least, the certificate must be confirmed by the affidavit of the medical practitioner or dental surgeon. Such affidavit may be made before a magistrate, before a number of court officials authorised to administer oaths, or before a commissioner for oaths, including those notaries who have applied for and been appointed commissioners for oaths. If all these conditions concur, the doctor or dentist issuing the certificate need not appear to give evidence in court. However either party, or the court *ex officio*, may nevertheless insist that he appear and give evidence in court and *viva voce*. This in practice means that whenever a doctor issues a certificate which is likely to end up exhibited in criminal proceedings, it is in his interest to ensure not only that he has complied with all the requirements I have just mentioned, but also that the contents of the certificate is as clear (by which I mean also clearly legible), precise and as comprehensive as possible. If it is not, either prosecuting counsel or defence counsel or both, or the court *ex officio*, may feel the need to question further the doctor on his findings, by summoning him to appear in court[4].

And this brings me to a more substantial issue: the role of the doctor in court proceedings. Although forensic medicine has a role to play in both civil and criminal proceedings, there is no doubt that in practice, if not in the popular

mind, it is generally associated with criminal proceedings. What is generally not appreciated, sometimes even by doctors themselves, is that a criminal trial proceeds along a set of rules avowedly designed to ensure that the final outcome of the trial — the verdict — reflects the truth. Our system of criminal procedure is essentially adversarial. I emphasise the word "essentially" because although one can detect traces of the inquisitorial system in committal proceedings — better known to you as "il-kumpilazzjoni" — by and large the rules governing the conduct of a trial and the admissibility of evidence have been copied from the English system which, as you may know, is eminently adversarial. Essentially the adversarial system means that the production of the evidence for or against a particular hypothesis is left entirely in the hands of the parties, with the court and, where appropriate, the jurors, acting as independent and final arbiters of the truth or otherwise of that hypothesis. On one important point, however, our system has departed from the English system, and that is on the question of expert evidence in a court of criminal justice. And it is in this context of expert evidence that the role of the doctor falls to be examined.

Unlike the English system, with which some of you, I am sure, are familiar, where either party to the criminal proceedings may produce his or her expert witness, in the Maltese Criminal Justice system experts are appointed by the court. This was also true until recently in civil proceedings in Malta. The 1995 amendments to the Code of Organisation and Civil Procedure have changed all that. A new provision — section 563A — now provides that "where a person is called as a witness, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence only if, in the opinion of the court, he is suitably qualified in the relevant matter". In practice this means that either party in a civil case may now produce his or her expert witness, including expert medical witness. The court, of course, retains the power to appoint its own expert — called a referee in civil proceedings — and will no doubt appoint such a referee if the experts produced by the parties do not agree in their findings or conclusions.

But in criminal proceedings the old position prevails: a witness is only an expert witness if he has been so appointed by the court. This is a point, which, from my experience as a lawyer and a judge, doctors sometimes fail to appreciate. Doctors who, not without justification, believe that they are the experts in medical matters, often take the witness stand in the mistaken belief that they can give evidence as experts. As I am sure most of you know the basic, if

not the only, difference between an expert witness and an ordinary witness is that the former may, in the course of his testimony, express an opinion based on his knowledge or expertise, whereas the latter — the ordinary witness — can only testify as to facts which are within his personal knowledge, that is facts which were directly observed or perceived by him through one of his senses.

The rationale of the distinction between an opinion and a fact is this: the drawing of inferences is said to be the function of the judge or jury, while it is the business of a witness to state facts. Thus, for instance, the doctor who has examined in the emergency or casualty department of a hospital a person who is the presumed victim of a stabbing, or the surgeon who has opened up the victim to explore the wound properly, can only describe the wound, its shape, extent of penetration, the internal organs which have been damaged, the extent of the internal haemorrhage, and so on; but, strictly speaking, they may not venture to state whether the wound is compatible with any type of instrument or with a particular instrument which may already be a court exhibit because, always strictly speaking, they would be expressing an opinion. Indeed, even the statement as to whether the person was at any time in danger of loss of life is, properly speaking, an expression of opinion. In practice, however, our courts of criminal justice have invariably allowed the doctor and the surgeon in these situations to express such opinions.

The question, of course, is whether such a practice is in line with the law ("*secundum legem*") or whether it goes against the law ("*contra legem*"). I would say it is neither, and that it may more properly be conceived as "*praeter legem*" — beyond the law — that is a legitimate interpretation of the law going beyond the original and narrow interpretation given to the provision of the Criminal Code dealing with the appointment of experts. Section 650(1) of the Criminal Code provides that "In all cases where for the examination of any person or thing special knowledge or skill is required a reference to experts shall be ordered". The law further specifies that the experts shall be "chosen by the court" and that "as a rule" they "shall be appointed in an uneven number". The operative words are "examination of any person or thing". In the majority of cases these words do not pose a problem. The doctor examining and describing the corpse at the scene of the crime before it is removed to the mortuary, the pathologists performing the autopsy, the chemist or other person appointed to examine the blood, the tool-mark examiner, the fingerprint expert — these are all in practice examining a person or a thing. But

what about the photographer at the scene of the crime? Can he be said to be "examining a person or a thing" or is he simply "keeping a record of a person or thing" through the medium of the lens and film? Yet we keep appointing expert photographers whenever the inquiring magistrate or a court requires photographs to be taken. Or take the case when what is required is, say, an opinion as to the effect of a given drug on a particular organ of the body. No examination of a given person or thing is involved. Must the court, in such a case, do without an expert opinion simply because no examination is involved? I would venture to say no: in such a case an expert may be appointed by the court. It can legitimately be said that in the practice of our courts of criminal justice the expression "examination of a person or thing" has been understood to include every situation where an expert opinion is required.

In other words, whenever the court is of the view that the judge or the jurors are not properly equipped to draw the right inferences from the facts stated by a witness because they lack special knowledge or skill, expert opinion is admitted. And nowhere does our law state that a person's appointment as an expert must precede his examination of the person or thing. The law merely provides (in section 650(5) of the Criminal Code) that "the court shall, whenever it is expedient, give to the experts the necessary directions, and allow them a time within which to make their report". Clearly it would not be expedient, much less necessary, to give directions to the doctor who has already examined in casualty the presumed victim. Therefore, when the court allows the doctor in the casualty department or the surgeon who has performed the urgent intervention to express an opinion it is in effect appointing them *ex post facto* as experts. What the court must be satisfied of is that that doctor or that surgeon has the required expertise to express such an opinion. In my experience it is not uncommon for doctors, especially junior doctors, on being asked for an opinion on gunshot wounds or even other type of wounds, to say quite frankly that they would rather not answer the question as they feel that it is outside their competence.

When a doctor is giving evidence in court, whether as an expert or as an ordinary witness, he very often has to contend not only with the court atmosphere with which he may be more or less unfamiliar, but also with unsympathetic lawyers and impatient judges. Whatever the doctor has to say, it is most likely to be of help to only one of the parties to the proceedings. The other party will therefore, in cross-examination, attempt to demolish or discredit the evidence of the doctor. Doctors very often feel that their medical reputation is threat-

ened in cross-examination. The purpose of a cross-examination is not to discredit a doctor's reputation — though I will not say that some unscrupulous lawyers will not attempt to do so — but to lessen as much as possible the probative value, that is the weight, which the judge or the jury are to attach to the doctor's evidence. The doctor who prefers a particular medical opinion must, irrespective of however honest he is about that opinion, concede that there may be others who will not agree with that opinion, that he may be wrong in his conclusion, and must therefore be prepared to revise it if cogent arguments are brought to his attention. If no such arguments are advanced he is, of course, to stick to his opinion. My experience as a lawyer and a judge has taught me that the most credible medical expert, especially with jurors, is the unpretentious doctor who is prepared to accept both the limitations of science and his own limitations while at the same time standing strongly by the opinion which he believes to be the correct one. In this context I can do no better than quote from a rather old text-book, John Glaister's eleventh (1962) edition of his "Medical Jurisprudence and Toxicology":

"In giving evidence," he says, "there are certain principles which should never be forgotten by the medical witness. The language used in the witness-box should be clear, concise, and as untechnical as possible. Such terms as "syncope", "comatose", "highly vascular", "oedematous" and others should not be used. It is impossible to expect a jury to know what is meant by the terms "pericardium", "meninges" and "calvarium", but the substitution of "heart-bag", "brain-coverings" and "skullcap" or "vault of the skull", will make matters clear.

"The language should be concise. Adjectives of degree, especially superlatives, should be used sparingly, and only when absolutely necessary, since their use may be regarded as biased opinion, and this discounts the value of the evidence. The voluble witness is often a godsend to opposing counsel with a weak case, since the witness saying more than is required is apt to say more than he means, and in doing so increases his vulnerability while under cross-examination. Categorical answers, where possible, are the best, and when not possible answers should be concise and clear.

"The replies of a witness should invariably be courteous. This is not difficult during examination-in chief, since both witness and examiner are in accord, but it frequently becomes less easy in cross-examination, when the object of the cross-examiner is to weaken, or if possible, negative the evidence given in

the previous examination. However trying the situation may be, the witness should keep the fact clearly before him that he is giving expression to honest opinion, and that he has but consistently to hold by what he has formerly said, and to give fully the reasons for his belief, to convince the court of his sincerity. It is usually with reference to opinions that differences between counsel and witness arise.

"It may be of assistance to the witness under cross-examination to bear in mind that it is the business of the cross-examiner to make the best case he can for his client. Calm but persistent restatement of former evidence will sooner or later break down even the most pressing cross-examiner, and a witness may rely upon the judge interfering when he considers that counsel is overstepping the bounds of legitimate cross-examination. In short, if the witness can preserve himself free of the assumption that cross-examining counsel is his natural enemy, and if he does not, therefore, assume the mental attitude appropriate to that view, he will leave the witness box, if otherwise he has been well prepared, with credit. There are occasions, however, upon which it is absolutely necessary for a medical witness to maintain a very firm attitude, and to decline strongly to have words attributed which have not been stated. Occasionally cross-examining counsel may ask a question, which is based upon a statement which he desires the witness to understand he has already made in reply to a previous question, the answer to which tends to put an entirely different complexion upon the tenor of his evidence. If the witness is collected he will detect the misstatement and at once challenge it....

"Evidence should always be given distinctly, deliberately and audibly. It has often been said by judges that no witnesses are so difficult to be heard and to be understood as medical witness; difficult to be heard from want of clearness in articulation, and difficult to be understood by reason of the nature of the evidence." (pp. 46-48).

Allow me, as a judge, to add a few other comments to that. Sometimes doctors are asked, in examination or cross-examination, to state whether or not a particular hypothesis put to them by counsel is either possible or probable. Very often the importance of a question put in such terms, and especially the importance of the answer given thereto, is not immediately apparent to the witness. The answer to questions put in this way, however, can be decisive for the prosecution or for the defence, and therefore decisive also from the point of view of the judge or jury. The reason is to be found in the rules governing the

degree of proof that must be forthcoming from the prosecution to prove its case, and the degree of proof that may be forthcoming from the accused in order to nullify the prosecution's case. It is therefore important for medical witnesses, particularly medical experts, to be aware of the legal implications of the words "possible" and "probable". It is trite knowledge that the prosecution must prove its case against the accused "beyond reasonable doubt". This means that at the end of the day whoever has to judge on the facts — whether the jurors, the judge or the magistrate — after having taken into account all the evidence, must be convinced, that is morally certain, of the guilt of the accused. If however the accused elects to prove something — which would generally be something to negative the charge by raising a reasonable doubt — or in those exceptional circumstances where, by express provision of the law, the burden of proving specific facts is shifted onto the accused — the accused is regarded as having discharged the evidential burden if he proves the fact or facts on a balance of probabilities, that is, if whoever is to judge comes to the conclusion that the accused's hypothesis even if not certainly true is probably true. A fact is said to be probable if, after taking into consideration all the known circumstances, it is more likely than not to be as stated. The interplay of "possibility" and "probability" within the context of the degree of proof required in criminal proceedings had been very well described by Lord Justice Denning in these words:

"Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice" (cf. *Miller v. Minister of Pensions* [1947] 2 All E.R. 372, 373-374).

Of course here Lord Denning is referring to the evidence taken as a whole, but the same reasoning process can be applied if one were asked a question with respect to one fact. To give an example, the question put to a medical witness who has just described a stab wound somewhere in the abdomen could be something like this:

"Am I correct in saying that the wound you have just described could have been self-inflicted?"

The medical witness has, of course, not heard all the other evidence in the case, and his answer must be based solely on his examination of the wound and the victim in general, and he would be well advised to say so in the first place. This is especially true in most of the cases appearing before our courts where the persons carrying out the autopsy have no idea of what was found, other than the corpse, at the scene of the alleged crime, because they have never been at the scene of the crime, nor even seen photographs of it[5]. The next thing is for the witness to ask himself whether, given the facts as he knows them from his examination of the victim, he is certain that the wound was self-inflicted; or whether it is more likely than not (i.e. probable) that it was self-inflicted; or whether it is possible that it was self-inflicted but, given the circumstances that he knows, it is not probable that it was so; or, finally, whether he can rule out completely even the possibility that it was self-inflicted. If the witness cannot honestly make up his mind as to any of these answers, he should candidly say so, and leave the necessary inference to be made by the judge or the jury after considering all the evidence as a whole. I am pointing all this out to underline the fact that very often a very quick answer, without reflection and fired, as it were, from the hip can have disastrous consequences whether for the prosecution or for the defence, and ultimately disastrous consequences for the proper administration of justice. Incidentally, there is at least one provision in the Criminal Code which specifically requires a doctor or medical expert to address the question of whether a particular consequence was probable as distinguished from either possible or certain. I refer to subsection (2) of section 216 of the said Code, dealing with grievous bodily harm:

"Where the person injured shall have recovered without ever having been, during the illness, in actual danger of life or of the effects mentioned in paragraph (a) of subsection (1) of this section, it shall be deemed that the harm could have given rise to such danger only where the danger was probable in view of the nature or the natural consequences of the harm."

A final point I would like to make is about reference to authority. The practice in our courts of criminal justice is that counsel, whether in examination-in-chief or in cross-examination, are not allowed to confront an expert by citing from text-books, articles in learned journals or other publications. They may, of course, make use of their contents for the purpose of formulating questions and testing hypotheses, but they are not allowed to make known to the jury what a particular author has said and whether that author is in agreement or in

disagreement with the witness. The reasoning of the courts is simple: whether one is referring to Bernard Spilsbury, Hugh Johnson or Keith Simpson, the fact is that none of these are giving evidence under oath; and also, unlike the expert in the witness box, they may not be cross-examined as to their statements, however authoritative those statements may be in medical circles. However, if the medical expert, because of his lack of previous first-hand knowledge of particular circumstances, feels that he cannot assume the responsibility of an opinion without reference to authority, he must be prepared, if so requested by the court, to place the book, article or paper at the disposal of the parties, who may then examine the witness with reference to other relevant parts of that book, article or paper.

Mr. Chairman, in this very brief paper I have tried to draw your attention to a few of the problems doctors encounter in our Courts of Criminal Justice. These problems are ultimately problems more or less of the proper administration of justice. After all forensic medicine would be pretty much useless if it did not take the form of documentary or oral evidence in a court of law. Allow me also to say, lest I be misinterpreted, that I am not in favour of parties to the proceedings being allowed to produce *ex parte* expert evidence. I believe that the situation obtaining under our Criminal Code is by far preferable to that under the Code of Organisation and Civil Procedure, where expert evidence, including expert medical evidence, may ultimately boil down to who may pay most. Finally I trust that I have not put off any one of you from appearing in court, or appearing before me, in your professional capacity, even though as I say this I am reminded of a cartoon which appeared years ago (in 1975, I believe) in a special edition of *Punch* which was largely devoted to courts and lawyers. It depicted an English barrister, looking pretty much distraught, rushing out of the court room and saying to a colleague he met in the corridor: "Six ruddy medical experts and they can't even agree on whether the judge is sane".

Thank you.

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[1]This is the text of an address delivered on the 7 November, 1998 on the occasion of the Maltese Forensic Medicine Conference held at the Westin Dragonara Reef Club Pavilion on the 6-7 November, 1998. The Conference was sponsored by Eli Lilly & Company. Mr. Justice De Gaetano is a Senior Lecturer in the Department of Criminal Law of the Faculty of Laws at the University of Malta. Before his appointment to the Bench he was Deputy Attorney General.

[2]Judge Caruana Colombo and I sat separately in the Court of Criminal Appeal. The Court of Criminal Appeal in its inferior jurisdiction — that is for hearing appeals from judgements of the Magistrates' Court — is composed of one judge. In its superior jurisdiction — that is for hearing appeals from preliminary decisions and from the verdict and sentence of the Criminal Court, the Court of Criminal Appeal is composed of three judges (the Chief Justice and two other judges).

[3] The relative Act was published in the Government Gazette of the 30 December, 1997, which means that in practice the amendment came into effect on the 1 January, 1998.

[4] Another amendment introduced by the same Act provides that when a doctor or dentist give evidence in the course of the inquiry relating to the *in genere* or in the course of committal proceedings (compilation of evidence), the deposition of that doctor or dentist is admissible as evidence in subsequent stages of the proceedings, including subsequent stages before another court, without the need of that doctor or dentist having to be summoned again to testify. However either party may demand, and the court may *ex officio* require, the doctor or dentist to be again examined in court and *viva voce* (section 646(8)). The practical effect of this amendment is that the pathologists who have given evidence in the course of the inquiry relating to the *in genere* would generally be exempted from giving evidence in the committal stage. However it is unlikely that either party or the court will exempt them from having to appear before the Criminal Court, since the autopsy report would generally have to be explained to the jury.

[5] There is nothing in our law preventing the pathologists appointed to carry out the autopsy from familiarising themselves with the scene of the crime or accident so that they may better interpret their findings. Nor are they precluded from receiving information from other persons, including other court appointed experts; the law merely provides that "If in the course of their work, the experts shall obtain from any person information on circumstances of fact, such person shall be mentioned in the report, and shall be examined in court in the same manner as any other witness...(section 653(3) of the Criminal Code).

JOSEPH FILLETTI

OSCE MEDITERRANEAN SEMINAR ON THE HUMAN DIMENSION OF SECURITY.
PROMOTING DEMOCRACY AND THE RULE OF LAW (VALLETTA 19-20 OCTOBER 1998)

"The Rule of Law: International Commitments and National nstitutions." Address by the Hon. Mr Justice Joseph A. Filletti (Malta)

Your Excellencies, distinguished delegates,

I stand before you with the challenging but formidable task of addressing you on the Rule of Law from the perspective of international commitments and national institutions. It stands to reason that before talking about commitments and institutions, we should have more or less a similar notion of the rule of law concept. At first glance, this might appear to be an easy notion to share but experience has shown otherwise. At popular level, it is generally agreed, even if somewhat hazily, that the rule of law is concerned with what government can do and how government can do it[1]. But the extent of the different interpretations and multiplicity of meanings that have emerged in the course of time has been so large that doubts and misgivings of all sorts have shrouded the concept.

The rule of law might have started as a legal rule originally but it is now clear that it cannot be severed from either political or moral considerations as well. To some, the rule of law 'represents a symbolic ideal against which proponents of widely divergent political persuasions measure and criticise the shortcomings of contemporary State practice'[2]. It is precisely because it seems to lack a precise core definition that it allows divergent views from the extreme or opposite poles of the political spectrum in the pursuit of their partisan political goals.

Given this rather intricate scenario that unfolds before us, you will pardon my delving for a brief moment into the ancient past with a view to tracing matter. It has after all become fashionable lately to think, talk and gauge in

terms of millenia. Almost two thousand years ago, a Roman senator, oftentimes engaged as counsel, took up the brief on behalf of a defendant accused no less of poisoning another individual. I shall not concern you with the factual vicissitudes or merits of that trial[4]. Rather, it is to draw your attention to certain remarks uttered by the learned orator in the course of his summing up the case for the defence and particularly the following,

" it is far greater shame, in a State which rests upon law, that there should be a departure from law. For law is the bond which secures these our privileges in the Commonwealth, the foundation of our liberty, the fountain-head of justice... The State without law would be like the human body without mind The magistrates who administer the law, the judges who interpret it – all of us in short - in order that we may be free."

Then, after an exhortative flurry of rhetorical questions, he continued thus,

"Look around at all departments of the State and you will find everything happening according to the rule and prescribed measure of law."

Granted that Republican Rome, and to an even lesser extent, Imperial Rome were far from being the ideal places where these fine and lofty principles could in practice be suitably nurtured and fostered, nonetheless Cicero's notions were truly outstanding. His were not new ideas. Other examples could be traced among the Ancient Greeks but certainly no one had as yet so eloquently spelt out the essential qualities of what should constitute the rule of law.

One would have presumed that Cicero's remarks needed no additional props to make them stand on their own feet. But we all know how resourceful and speculative mankind can be. So that it comes as no surprise to learn that in the course of time different and even contrasting interpretations sprang up. During the first two decades or so of this century, many were wont to associate the notion with the views of a British legal pundit, A.V. Dicey, as they flow from his commentary on the British Constitution. Essentially Dicey maintained that the rule of law requires that no man be above the law, that no man be punishable for other than a breach of law and that every person be treated equally before the law[4]. In time, certain aspects of Dicey's views became the subject of scathing attacks both from conservative and progressive quarters alike. To start with, and more so nowadays, the issue involves much more

than meting out punishment to transgressors. What would be the position, for example, were it to result that the State has used its control over the legislative process to undermine political or civil liberties? What if the statutory law itself is manifestly unjust? After all, both communist and fascist regimes justified the taking of oppressive and repressive measures against the ordinary citizen on the pretext of strict legality and obedience to the laws of the State. Or conversely, you could have a perfectly sound law but which, however, remains a dead-letter, neglected or completely ignored by the institutions of the State. Also, due to a misconception, Dicey disliked the French *droit administratif* system. But a century and half later, in the 1960s, a new line of thought favoured the introduction in Britain of a similar comprehensive system as the one practiced in France[5].

In the course of reviewing the ensuing debate during a regional colloquy held last month in Strasbourg under the auspices of the Council of Europe to mark the 50th Anniversary of the Universal Declaration on Human Rights, the general rappporteur *inter alia* stated that[6],

"The problem with Communist totalitarianism was not that it eliminated the language of rights. After all, even Stalin's Constitution of the Soviet Union was full of phraseology of 'rights'. Rather the problem is the inability to enforce them, if there is no rule of law... "

The link between the rule of law concept and the protection of civil liberties and human rights is inevitable. What we are talking about here is the relationship between the modern State and the day to day lives of its citizens. All too often, modern views of human rights stress upon the need to defend the individual against the State. It is one of the ways how the human dimension is related to the rule of law and, for that matter, law in general. In the way law is enacted and enforced it ought to be reasonably certain and known. Where the law confers wide discretionary powers there should be adequate safeguards against their abuse.

By way of furnishing us with a comprehensive description of the rule of law, De Smith and Brazier comment as follows[7],

'The concept is one of open texture, it lends itself to an extremely wide range of interpretations. One can at least say that the concept is usually intended to imply

(i) that the powers exercised by politicians and officials must have a legitimate foundation; they must be based on authority conferred by law; and

(ii) that the law should conform to certain minimum standards of justice, both substantive and procedural."

The detailed application of the rule of law requires a process of constant fashioning to determine its local and particular content in the light of an appreciation of the limits and benefits of legality, of modern governmental practice and of constitutional theory and procedure.

To my mind it is more natural and logical to elaborate first on national instruments before expanding upon international commitments, even though the one complements the other. It may be true that in a sense the two aspects can be discussed disjunctively but in so doing there is the danger of weakening the vital nexus between the two aspects.

The difficulty with the rule of law is that essentially it consists of values and not institutions. But behind the notion inevitably lies the State for its aim is to strike a just and workable balance between public order and individual liberty. If governmental rights are over-stressed, very often this would be at the expense of citizens' rights and vice-versa[8]. The stability of the institutions of the State within a democratic framework as well as the protection of civil rights depend upon it. Exercising power and the temptation to abuse it are always close to one another. The rule of law is designed to keep the powers of State, and of others wielding power, in check. Since legislative and executive power vests in the State authorities, it falls upon the judiciary to provide a balance and the possibility of checking over the other two institutions. The establishment of an independent judiciary, a clear and transparent judicial system with a prescribed set of substantive and procedural laws and regulations are today taken for granted in most countries, even if not wholly applied. The independence of the judge has to be above reproach so as to ensure that people have a trust in the system that is basic to the respect for the law, without which no democratic society can thrive. Rules must exist governing the judicial office and organic infrastructure that protect or assist the judges. Also, the national judicial institutions must guarantee everyone genuine access to an independent and impartial court and free legal aid if necessary. Any judicial system which sanctions material hindrances to access to justice on account, say, of exorbitant legal costs or the non-availability of a free-legal

aid system for those in need, goes counter to the rule of law principle. At the same time, independence and impartiality of justice must be understood as an added safeguard the citizen is entitled to rather than a means of self-protection for judges. Quite a number of violations have been declared in judgments delivered by the European Court of Human Rights on this point. We can stop and reflect about this negative side to dispensing justice by a State institution because there is an additional structure at international level. But what is the position where no such institution exists? In his most recent address to the Parliamentary Assembly of the Council of Europe delivered last month in Strasbourg by the President of the Republic, His Excellency maintained that,

"The juridical formulations of the limits of individual freedom and the limitation of the rights of the State are still matters of considerable controversy, but we have at least in Europe agreed on the basic concepts and we can extend our experience."

Clearly, his is an invitation for Europe to look beyond its region and share its experience and know-how with other regions by way of an international commitment.

The complexity of modern government has led to other institutional developments. The duties incumbent upon the State have increased considerably in modern times: the State must legislate extensively and govern with the common good as its ideal goal. It has 'positive' obligations to ensure that citizens' rights are fully enjoyed and observed by taking appropriate measures. It must refrain from unduly interfering with the rights of its citizens. So-called administrative discretion has at times tended to become arbitrary, high-handed, discriminatory and even abusive. It is precisely for this reason that the judiciary was also invested with the duty of judicial review of administrative discretion. New governmental structures added more pressure on the already overburdened load on the courts. Other institutions and remedies were called for.

Other forms of independent national institutions as, for instance, the Ombudsman, mediators, arbitration tribunals and ad hoc commissions constitute another important way of ensuring the respect for and compliance with the rule of law. Complaints of all forms by citizens do not, and should not, necessarily qualify to be dealt with by a court of law. The development of the Ombudsman system, as a national institution, has in particular, been hailed as a

success wherever it was set up. The office has become much more than a name for many people: it is one reliable, impartial and nonadversarial way of defending citizens' rights against the State. This institution has been extended to various areas and not solely to governmental practice. The office is particularly suitable for implementing economic, social, and cultural rights as well as civil and political rights especially in the defence of disadvantaged groups or individuals.

In Malta, since 1995, we have an Ombudsman to investigate citizens' complaints against various governmental sectors including areas in which the government has a controlling interest [10]. An Ombudsman has been appointed to deal with complaints concerning the university. In other countries, Ombudsman have been appointed to monitor general hospitals, mental asylums and even prisons. In the process there has been a proliferation of the use of the name 'Ombudsman' by way of complaint mechanisms which have often been confined within an organization, and which are neither independent nor impartial. Disappointment on account of this confusing development has had in certain countries an undermining effect on the public understanding of, and confidence in the Parliamentary Ombudsman. So long as the system remains contained in all respects, its future looks bright and promising, but not otherwise.

Earlier on I have said that we can only move towards international commitments provided that in the first place our own house is in order. International strife is very often the projection of local abuse. The process of implementation and prevention should begin at national level. It is the State that should be the principal custodian of the rule of law. At international level, the rule of law originates from those basic sources that make up international law. Unlike the position under domestic law, insofar as States are concerned, the subjects of international law enjoy sovereign rights. When conflicting national interests are present, it may become cliffficult to maintain order in the behaviour of States with one another. One fundamental principle in international law, ensuring compliance to international obligations by States, and hence a rule of law, is the principle of *pacta sunt servanda.* Adherence to the UN Charter and other international treaties or conventions is an international commitment that should never be taken for granted. The arbitrary use of force by one State against another, for instance, undoubtedly constitutes a serious violation of the rule of law at international level but it took quite some time to be so recognised. It was exactly 70 years ago that it was realized that until then,

and despite existing mechanisms for the prevention of war under the provisions of the Covenant of the League of Nations, there was no formal agreement as such that prohibited war absolutely. By means of the 1928 Pact of Paris, the international community of States agreed, for the first time, to renounce war as an instrument of national policy.

After the landmark 1948 UN Universal Declaration on Human Rights, the 1959 Declaration of Delhi endeavoured to bridge the gap between theory and practice by giving material content to the rule of law. The New Delhi Conference examined the various areas of government with a view to pointing out where the rule of law should be mostly felt[11]. The basis of all law, it affirmed, comes from a respect of human personality. Since then successive international documents have enlarged further the concept without losing sight of the main constituents. Then followed the two landmark UN Covenants - The International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights in December 1966, eighteen years after the adoption af the Universal Declaration - although both instruments had to wait until 1976 to obtain the requisite thirty-five ratifications. The OSCE too has been in the forefront among those organisations that gave special and constant attention to the rule of law principle.

Constant criticism is levelled at the United Nations Organization and other intergovernmental organizations for not having done or are not doing enough to lessen international conflict, take decisive action against serious violations of international humanitarian law, redress social imbalance and check other threats to international peace and security. I think that despite all the shortcomings, this criticism is not fully justified. In Europe alone, during the 1970s right-wing dictatorships in the West made way for democracies. The 24-year span from the outstanding Helsinki Final Act, 1975 till today has witnessed the gradual evolution of security and cooperation in Europe and beyond towards a less hostile international climate especially in East-West relations. Left-wing totalitarian regimes in Central and Eastern Europe eventually collapsed as well. Confrontation gave way to mutual understanding and cooperation among States. On the negative side, in some instances, political and economic changes came about too abruptly. National institutions were either lacking or suspect. Territorial, ethnic, religious, cultural and other differences complicated matters even further. The transition was not always smooth; nevertheless the change for the better continued. In this regard, the various CSCE Accords that were reached served to spur on national institutions from the conceptual to the implementa-

tion stage. Implementation, in turn, demanded constant supervision and international monitoring. Such tasks went far beyond the possibility of judicial review. Other actors had to take a more engaging role. A better informed public, a watchful media, outside observers, the active involvement of non-governmental organizations, human rights defenders - all lent a helping hand to create the ideal democratic set-up where the rule of law could really work with ease. Remember that, quite often, NGOs and other voluntary associations are among the first to identify the plight of vulnerable groups.

During the past decade the OSCE always strove to give more meaning to the rule of law concept both with respect to national institutions as well as a means of conflict prevention. In the Copenhagen Document of 29 June 1990[12], the participating States affirmed that pluralistic democracy and the rule of law are essential for ensuring the respect for all human rights and fundamental freedoms, the development of human contacts and the resolution of other issues of a related humanitarian character. Established principles were given a more tangible form. For instance, in reaffirming that democracy is an inherent element of the rule of law, the importance of pluralism with regard to political organisations was specifically identified. Among those elements of justice essential to the full expression of human dignity, it mentioned that military forces and police were to be under the control of, and accountable to the civil authorities[13]. Once more, the old but basic norm that no one is above the law was reiterated in the Charter of Paris for a New Europe during the CSCE Summit of 21 November 1990.

A new sense of commitment was added to the concept at the Moscow Meeting of 3 October, 1991. Aware of the threatening scenario in certain areas, the participating States resolved to support 'vigorously' the legitimate organs of a State in the event of an overthrow or attempted overthrow, by undemocratic means, of a legitimately elected government of another participating State. A formal commitment was undertaken to counter any attempt to curb the basic value inherent in the rule of law.

The need for a comprehensive approach towards a more secure future within a democratic framework was again highlighted in the Lisbon Summit Declaration of 1996 . This strategy required improvement in the implementation of all commitments in the human dimension. A list indicating so-called "acute problems" that needed to be addressed by the OSCE highlighted the following:

• the continuing violation of human rights;

• threats to independent media;

• electoral fraud;

• manifestations of aggressive nationalism;

• racism,

• chauvinism;

• xenophobia,

• anti-semitism.

It stands to reason that the international commitment that is necessary to combat such problems cannot be achieved by one international organisation, like the OSCE, acting on its own. The UN Commissioner for Human Rights, Ms Mary Robinson, in a recent address to the Council of Europe to mark the 50th Anniversary of the Universal Declaration on Human Rights stressed that[14],

"The abuses prevalent in modern conflicts are appalling; and they are not just distant problems but tragic realzties also for European peoples, most recently in Kosovo.

They encompass widespread assaults on the right to life... Torture is common, as are measures attacking peoples' freedom of movement – forcible re-locations, mass expulsions, denial of the right to seek asylum... or the right to return to one's home.

Women and girls are raped by soldiers and are abducted into forced prostitution, and children are recruited to be soldiers. Tens of thousands detained in connection with conflicts 'disappear', usually killed and buried in secret, leaving their families with the torment of not knowing their fate. Thousands of others are arbitrarily detained, never brought to trial or, if they are, subjected to grossly unfair procedures. Civilian homes and property, schools, health centres and crops are deliberately destroyed. Those who try to assist civilians by providing humanitarian aid are attacked. Insofar as such abuses are oc-

curring in Europe they interrogate Europe's integrity and commitment to the values of the Council of Europe.

In an age of global communication, and media coverage these abuses are known to us all. Even if some conflicts are neglected by our media, we cannot plead ignorance. A few minutes searching on the Internet brings to light detailed information on such abuses in any serious conflict in the world today. The problem is not lack of information but a lack of appropriate action... "

All of these large-scale abuses stem from a total disregard of the rule of law. International organisations should do everything within their power to act whenever gross violations against the rule of law are manifest. The creation of a special international tribunal to deal with war crimes committed in the territory of ex-Yugoslavia was a positive step but in the long run the creation of *ad hoc* tribunals after the event is just not good enough and legally tenuous. For this reason, the convention establishing an International Criminal Court on a permanent footing is a most welcome development in the international field. The OSCE and other organisations should commit themselves in this regard to do their utmost for its rapid adoption by the international community.

Our focus should be on how international institutions, with their strengths and capabilities, can work together to achieve greater cohesion on mutually reinforcing institutions, utilising their respective and comparative advantages. Action speaks louder than words. At this very moment, the OSCE is deploying an assessment team to Kosovo to prepare the way for some 2000 verifiers who are expected to arrive in the province in the very near future. Their job, not quite an easy one, will be to evaluate the Serbian government's compliance with the United Nations' demands for an immediate end to the conflict in Kosovo. We wish the OSCE verification mission every success. Short of extreme remedies like the use of force, and to a lesser degree, imposing economic sanctions, we should look towards medium and long term projects. In other words, we should not solely focus on tense ethnic or political disputes but also on chronic structural deficiencies at the national level as a result of which the rule of law suffers. Implementation and prevention, by way of an international commitment, implies providing more administrative support and financial assistance to the training of personnel and the launching of information campaign programmes[15].

One stumbling block that needs to be addressed by multi-State organisations

like the OSCE is how to overcome the perception, real or contrived, that taking appropriate action is tantamount to illegally interfering or intervening in the internal matters of this or that State.

My country too is deeply committed to upholding the rule of law principle whatever the cost. Like many others, my country too has had its own occasional lapses against the rule of law. On the positive side, it can safely be said that these lapses were very few and, in the main, adequate redress was provided, even if not always promptly. Indeed, whatever their failings, the Maltese people always had a profound respect for the rule of law. As you might have occasion to observe during your short stay among us, Malta and its people are proud of their historic past. Whenever it was a matter of defending our rights, the Maltese never shirked from their duty to stand up and be counted. Way back in 1802, a Maltese Declaration of Rights was presented to the United Kingdom Government on behalf of the people of Malta and Gozo. One paragraph in particular of this Declaration most aptly encapsulates the very essence of the Rule of Law[16],

"No man whatsoever has any personal authority over the life, property or liberty of another; power resides only in the law, and restraint or punishment can only be exercised in obedience to law".

Joseph A. FILLETTI

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CHIEF JUSTICE EMERITUS
GIUSEPPE MIFSUD BONNICI

EXHAUSTION OF DOMESTIC REMEDIES

The plea in the Convention for the Protection of Human Rights and Fundamental Freedoms.

1.The European Convention for the Protection of Human Rights and Individual Freedoms was signed in Rome on the 4th.November 1950, but came into force only three years later, on 3rd. September 1953. It set out a procedure which could be made use of by those persons who alleged that they were the victims of violations of their fundamental rights and freedoms, by any one of the High Contracting Parties of the Convention.The procedure could be initiated by a petition addressed to the Secretary General of the Council of Europe and lodged with the European Commission of Human Rights. The Commission could then deal with the matter mentioned in the petition.

2. Before proceeding further with its examination however, the Commission had to establish, if so required by the respondent State, whether the applicant or petitioner, had exhausted the remedies which were available according to the domestic legal order:-

"The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken"

This was Article 26 which now, as from 1st. November 1998, appears as Article 35; the word 'Court' has now replaced the word 'Commission'.

What follows are some considerations on how, that part of the article which states:
" **after all domestic remedies have been exhausted according to the gen-**

eral recognized rules of international law"
has been interpreted and applied by the European Court of Human Rights.

Points of Procedure.

3. Before proceeding with the examination of the interpretation of the exhaustion rule arrived at by the Court, it is perhaps necessary to note three procedural points, connected with the application of the plea, which to any ordinary advocate who is also a practitioner in Courts of Law, would have been taken foregranted. Not so in the Strasbourg experience. In the initial cases debated before the Commission various doubts were raised and it took some time to arrive at the following usual settlement of the difficulties. These three points are [i] that it is up to the State to raise the plea that the applicant has not exhausted all the domestic remedies which were at his disposal according to that State's National Legal Structure; [ii] that once the plea is raised it is incumbent on that State to prove what it alleges; [iii] the applicant has, finally, the burden to prove otherwise, after the State has succeeded to prove its plea.

The scope of the rule.

4. It is clear that the best and ideal position which the Rule of Law tends to achieve, is that fundamental rights and freedoms are respected, protected and enforced in every State at the national, or as it is called, the domestic, level. It is only when this somehow fails that the need arises to have recourse to an international tribunal to correct the deficiency.

The Convention therefore, in conformity with this principle encourages its member States to settle all matters which may arise regarding fundamental rights and freedoms within the ambit of their own legal order and will only exercise its jurisdiction, if and when that national legal order does not come up with an adequate answer. Hence the importance of Article 35 for understanding the basic philosophy underlying the comprehensive and systematic thinking and practice on this aspect of the Rule of Law which has now, since the end of the Second World War [1939-1945], flourished and spread, at least, in most parts of the Western part of the World.
5. These aims of this important rule, which bring out the basic general thinking upon which it is based, have been expressed in various judgments of the Court. The following are some of the most salient expressions:-

" The rule of domestic remedies, which dispenses States from answering be-

fore an international body for their acts before an international body before they have an opportunity to put matters right through their own legal system, is also one of the generally recognized principles of international law to which Article 26 [now 35] makes specific reference"[1], and further down in the same judgment:-

"..the essential aim of which [i.e. the rule] is to protect the national legal order"[2]

6. The purpose of this short study is very limited. The rule has been considered by a substantial number of judgments of the Court. The conclusions arrived at vary considerably. It is difficult to state that there is in fact a definite jurisprudential line which can be said to have been really established by the Court; except perhaps to say that on the whole, an overview will come down to the proposition that 'the protection of the national legal order' does not seem to have had from the Court the expected and due recognition which was laid down by the Convention.

7. It is not often that the Court, has in fact, found in favour of a State's plea that domestic remedies had not been exhausted by the applicant before recourse was had to the Strasbourg Organs. It is therefore instructive to examine in some detail[3], one of the earliest examples of a judgment[4] which accepted the plea raised by a State of non-exhaustion of domestic legal remedies by the applicant. Few others followed it and it served as an opportunity for the Court in Plenary Session to explain how it understands the rule when it concludes in favour of the acceptance of the plea. It is instructive because it is exactly in this positive, in the sense of acceptance of the plea, judgment which demonstrates, more than any one of the numerous negative judgments, how the Court through its interpretation of the article has weakened it to such an extent that sometimes one gets the impression that, in truth, the Court has forgotten that it is also incumbent upon it to look favourably upon all those national domestic legal structures which do provide remedies when fundamental rights and liberties are violated. His weakening of the rule reaches very dangerous levels in certain cases as shall be commented upon in the second part of this short study.

8. Danielle Van Oosterwijck was born in Belgium and registered as a child of the female sex. Very early in life she became conscious of a dual personality; although physically female she felt herself psychologically of the male sex. Specialist doctors found symptoms which indicated trans-sexualism. Hormone therapy was accepted and applied which brought about changes in hair growth

and change of voice. From 1970 to 1973, in measured stages, surgical interventions- bilateral mammectomy, hysterectomy, bilateral ovariectomy and phalloplasty, - substituted a female to a male physique. Only the chromosomes of the female type remained.

9. On completion of this painful and stressing process, Van Oosterwijck filed a petition to have the birth certificate 'rectified' so that that certificate should henceforth read ' a child of the male sex with the forenames of Daniel, Julien...son of...'

Belgian Law, like ours, permitted an action for correcting a birth certificate if an error was detected and proved. Any other registered certificate, marriage, death etc. was similarly treated. In the instant case, the Brussels Court dismissed the action as no error was demonstrated. The Court of Appeal confirmed the first decision and Van Oosterwijck decided not to have recourse to the Court of Cassation. The decision of the Court of Appeal was delivered on 7 May 1974, and shortly afterwards, on 2 July 1974, a new law came into force which permitted a person to seek an authorization to have his forenames changed for the purposes of having them on his identity card together with a photograph of the person's actual physical appearance.

10. On 1 September 1976 Van Oosterwijck applied to the Commission alleging that the refusal of the Belgian State had brought about his 'civil death', an inhuman and degrading treatment [art.3]; was obliging him to use documents which did not reflect his true identity [art. 8 respect for private life]; perpetuating a distortion which eliminated the right to marry and to establish a family [art.12].

11. The Commission dismissed the Government's plea that the applicant had not exhausted all the domestic remedies available, but the plea was raised once again before the Chamber of the Court, which because of the importance of case relinquished jurisdiction in favour of the Plenary Court which on 27 February 1980 accepted the plea and thereby referred the applicant back to the domestic legal order.

12. The Government pleaded that a] no appeal on a point of law had been made to the Court of Cassation; b] the convention itself was not pleaded either in first or second instance; c] no application under the new law had been made for authorization to change forenames, and lastly, d] the applicant did not institute

an *'action d'etat'* which is a special action pertaining to personal status.

13. In reaching its decision, which is the first judgment in which the Court examined in some detail the implications of art. 35 [previous 26], the following points were considered and established:-

[A] "The only remedies which ... the Convention requires to be exercised are those that relate to the breaches alleged and at the same time are available and sufficient ."

{i} as to the first part of this statement 'In order to determine whether a remedy satisfies these various conditions and is on that account to be regarded as likely to provide redress..... the Court does not have to assess whether those complaints are well-founded: it must assume this to be so, but on a strictly provisional basis and purely as a working hypothesis';

{ii} as to the second part - remedies which are 'available and sufficient', the Court refereed back to *dicta* in previous judgments, beginning with that of the Stogmuller Case[5] of 1969. Reference to what was said in this latter case, began with the Vagrancy Cases of 18 June 1970,[6] already mentioned, and continued with the Airey Case of 9 Oct. 1979 [7] and the Deweer Case of Feb. 1980 [8], and it is therefore useful to quote it in full :-

"As to the point whether the proceedings instituted {*saisine*} may embrace complaints concerning facts which occurred after the lodging of the Application, international law, to which Article 26 refers explicitly, is far from conferring on the rule of exhaustion the inflexible character which the Government seem to attribute to it. International Law only imposes the use of the remedies which are not only available to the persons concerned but are also sufficient, that is to say capable of redressing their complaints."[9] [B]. the recourse to the Court of Cassation should have been made because that Court has jurisdiction ' to state the law and thereby set the course for subsequent judicial decisions. There is nothing to show that an appeal to the Court of Cassation on grounds of the national legislation *stricto sensu* would have been obviously futile.[10]'

[C] since the Convention forms part of the Belgian legal system, the applicant could have relied on Article 8 and this in his own country.[11]
[D] the *actions d'etat* deal with issues of substance as their purpose 'is to establish, modify or extinguish personal status [12]'; however in this context the

Court held that :-
" The rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the case."

Accordingly the Court concluded, on this point, that 'in the absence of any decided cases in Belgium' on actions of this type, the applicant was not expected to be at fault for omitting to institute such an action .

14. One can summarize therefore the points of interpretation given by the Court as follows:-

[a] the domestic remedies claimed by the defending State have to be available and sufficient.
This 'interpretation' borders on the obvious and the tautological. Manifestly a State cannot raise the plea without having within its own legal structure remedies which can not only potentially but also actually, resolve the violations alleged by the applicant if these are proved to have occurred. It is to be recalled that this 'available and sufficient' formulation, was used initially by the Court in the Stogmuller Case in answer to the preposterous pretension by the State that the applicant was obliged to make use of remedies provided by the State after he had recourse to the international organs. Obviously not; and therefore an obvious rejection by the Court. But as time went by the statement came to shed its 'textual' meaning, and became a sort of password which through sheer repetition, as a general ground-cover, sometimes being so 'obvious', to come dangerously close to disarming the rule. As shall latter be illustrated.

[b] The plea by the State will not succeed if the remedy which was supposedly at the applicant's disposition, would have been obviously futile when attempted.

[c] The rule is neither absolute nor capable of being applied automatically; and therefore it is essential to have regard to the particular circumstances of each case.

These three modes of interpretation have been followed uninterruptedly up to now [ie.the end of 1998] by the Court and in certain cases, as shall be seen, they have been applied in such a way that one can really consider that the

protection of the national legal order essentiality of the rule has suffered severe obfuscation.

15. The second part of this study will discuss some interesting and controversial cases in which the Court rejected the plea of exhaustion of domestic remedies.

REFERENCES

[1] De Wilde, Ooms and Versyp Cases {Vagrancy Cases}.18th. June 1971.Series A. Vol.12. p.29.para.*50.

[2]The phrasing is a bit loose, and the use of the word 'before' may give rise to a slight misunderstanding. One would have preferred the wording used by Judge A.Verdross in a Separate Opinion in a later judgment:' ...the limits of an international body's jurisdiction in the field in question are designed to protect the States from finding themselves arraigned at international level **before** they have had an opportunity to redress a violation which may possibly have been committed by an organ of lower rank. Consequently, every provision in this category must be interpreted strictly'.Ringeisen Case. 16th. July 1971. A.Vol.13. p. 50.*1.
Ibid.p.31.*55.

[3]. I am a strong believer in the connection Fact cum Law, i.e. the application of every rule or norm of Law if it is to be well understood, has to be examined and seen against the underlying background of fact. This always means that no proper understanding of a rule is really possible until and unless it is 'tested' by immersion in the ' facts ' of reality. In this sense I am a realist, modestly following the teachings of the great realists -Aristotle and Aquinas.

[4] Van Oosterwijck Case. 6.Nov.1980.SeriesA. Vol.40.

[5] Stogmuller Case, 10 November 1969.Series A, Vol.9.p. 42.*11.

[6] See note 1 above.

[7] Airey Case Series A, Vol.32. 1979.p. 11. *19.

[8] Deweer Case, Series A. Vol. 35. P.16. *29.

[9] Stogmuller p.42. *11.This paragraph had also received an 'unusual' reading and 'significance' by the Court in the Guzzardi Case of 6 Nov.1980, Series A Vol.39. when on page 26,* 72 it stated :'However, Article 26, which refers to 'the generally recognized rules of international law' should be applied with a certain degree of flexibility and without excessive regard for matters of form'. It is difficult to find a logical justification for this deduction. But it appears that this kind of 'connection' can be explained by the general diffidence which the Court reserves for Art.35.

[10] ibid.*32.

[11] ibid.*.33

[12] ibid.*35.

DR AUSTIN BENCINI

THE 1998 DISSOLUTION OF PARLIAMENT

The presidency of H.E., Dr. Ugo Mifsud Bonnici, the Fourth President of Malta, had a number of institutional 'firsts'. One can mention that the President was the first to preside over the workings of the Commission for the Administration of Justice set up by Article 101A of the Constitution. He was the first President to address presidential messages to Parliament. The President was the first to dissolve Parliament twice during his term of office, in 1996 and in 1998. More significantly, he was the first Head of State, since Independence to preside over a political crisis involving the loss of confidence of a government by Parliament.

This article purports to review some of the constitutional implications in regard to the dissolution of Parliament in 1998 as well as the vote of confidence that led to the dissolution. Our constitution, in it's 34 years of existence has started to evolve its own conventions and practices, understood in their classic constitutional formulation as rules of political practice considered as binding but not enforceable in a Court of Law. The institutional workings behind the withdrawal of confidence by Parliament, the first instance since Independence, bears an interest beyond the political contingency, and may therefore serve as a guideline for future events.

The political crisis started in November 1998, when the former Prime Minister, Mr. Dom Mintoff started to abstain from voting during the debate on the budget, thereby annulling the one seat majority enjoyed by the government without actually toppling the government headed by the then Prime Minister, Dr. Alfred Sant. The Speaker was called upon on various occasions to make use of the casting vote.

The crisis precipitated during the debate on the resolution presented by government in regard to the Cottonera project. The Prime Minister made the following statement in Parliament, just before the final vote on the resolution was taken:

> *"Sinjura President, irrid naghlaq billi nghid li l-grupp parlamentari u l-ezukuttiv nazzjonali kkonfermaw id-decizjoni li habbarna l-gimgha li ghaddiet fil-media li kontra dak li ghidna fil-bidu ta' dan id-dibattitu, mhux se jkun hemm insistenza min-naha taghna li l-vot ta' fiducja jghaddi permezz tal-voti kollha tal-membri parlamentari minghajr casting vote, imma l-vot ta' fiducja fuq din il-mozzjoni hu mizmum bhala vot ta' fiducja u qed nistennew li jghaddi minn dan il-Parlament. Jekk ma jghaddix minn dan il-Parlament, il-Gvern se jqis li tilef vot ta' fiducja."*

The Prime Minister's statement therefore emphasized two points:

a) That the government considered the majority of all the members of the House as no longer applicable to the resolution and

b) That this notwithstanding the government still considered the vote as one of confidence.

On the same day, July 7th, 1998, the final vote was taken and Mr. Mintoff obliged by voting against the motion which, after a division, was defeated by 35 votes to 34.

The Prime Minister did not indicate the government's course of action in the aftermath of the vote. In this context reference may be made to a statement made on March 28th, 1979, by Mr. Jim Callaghan, British Prime Minister in the aftermath of a loss of a vote of no confidence in the House of Commons. He stated:

> *"Mr. Speaker, now that the House of Commons has declared itself, we shall take our case to the country. Tomorrow I shall propose to Her Majesty in parliament that parliament be dissolved as soon as essential business can be cleared up, and I shall then announce as soon as possible - and that will be as soon as possible - the date of the election and the date of meeting of the new parliament."*

The constitutional background to the Prime Minister's statement lies in the provisions of article 76 of the Constitution, and specifically subsection 5(a):

> *"If the House of Representatives passes a resolution, supported by the votes of a majority of all the members thereof, that it has no confidence in the Government, and the Prime Minister does not within three days either resign from his office or advise dissolution, the President may dissolve Parliament."*

The Constitution of Malta has to a large extent incorporated in a written form the unwritten conventions of the British Constitution, particularly in the definition of those areas where the Head of State "acts in accordance with the advice of the Cabinet or a Minister" (Article 85). These have been considered to have retained their conventional nature since whether the Head of State has received or acted in accordance with such advice may not be enquired in a Court of Law (Article 85, subsection 2).

An important addition to British practice, however, was introduced in the requirements contained in article 76(5)(a), for a vote of no confidence to be carried namely those of a majority of all the members of Parliament expressed through a resolution. The reason behind such a requirement was to avoid the creation of political instability arising from a snap vote in Parliament, which would leave the government defeated. So a Resolution is required and a simple majority of those present and voting alone would not be enough.

Clearly, the expression "all the members of the House" had the added consequence, from a technical aspect of excluding the Speaker from using the casting vote since in this circumstance Parliament either reaches the required number of votes or not. No tie is possible. The Prime Minister was clearly conscious of this factor.

This provision does not go as far as a constructive vote of confidence would require. It, however, ensures that Parliament would be conscious of the institutional consequences of the vote prior to the vote itself being taken. Parliamentary stability is a constant feature of our parliamentary majorities as a consequence of the two-party system that has dominated the political scene since Independence. When the Constitution was being drafted, and when it came into force however, the political situation was completely different. Parliament had five political parties represented and in 1964 the majority party enjoyed an overall majority of only one seat.

Other Constitutions ensure that votes of no confidence do not the result from

snap votes. The Constitution of Italy, for example, requires that *"la mozione di fiducia deve essere formata da almeno un decimo dei componenti della Camera, e non puo essere messa in discussione prima di tre giorni della sua presentazzione"*. (Articolo 94).

The Prime Minister's statement clearly indicated that the Cottonera resolution was no snap vote since the issue of confidence was already before Parliament. Through this statement, the Government exercised its political prerogative of linking the resolution to a question of confidence and of choosing to reduce the political threshold from an absolute to a simple majority.

Victory, all be it with the Speaker's casting vote would, of course have been sufficient. Conversely the loss of confidence on the resolution could have brought into action another prerogative; the Presidential prerogative to dissolve Parliament if to the President's mind, the conditions contained in article 76(5)(A) existed following Parliament's removal of confidence.

The Constitution specifically stipulates that the President may dissolve Parliament on the advice of the Prime Minister. Article 76(5) provides:

> *"In the exercise of his powers under this section the President shall act in accordance with the advice of the Prime Minister."*

However,

> *"The President may act in accordance with his own deliberate judgment in those cases stipulated in article 85 of the Constitution, amongst which there is, Subsection (a): "in the exercise of the powers relating to the dissolution of Parliament conferred upon him by the proviso to subsection (5) of section 76 of this Constitution."*

This constitutes another departure from the British situation in that our Constitution envisages the possibility of the President dissolving Parliament WITHOUT the advice of the Prime Minister as long as the elements of article 76(5)(a) concur. Not so in the United Kingdom:

> *"There is no instance in this country, since the Restoration, of a*

> *Sovereign attempting to dissolve Parliament without or against the advice of the Ministry." (Constitutional and Administrative Law – O. Hood Phillips and Jackson 6th Edition Page 147).*

The government limped on for a few more weeks after the confidence vote and on the 3rd. August 1998, the advice to dissolve Parliament was tendered by the Prime Minister to the President in terms of Article 76(5) referred to above.

What is of interest is that the President did not simply accept the advice tendered. He spelt out the circumstances in which the advice was being accepted. This becomes manifest when comparing the proclamation the President issued when dissolving Parliament in 1996, to that of 1998.

In 1996 Parliament was also dissolved before the natural time limit of five years and also on the advice of the then Prime Minister, Dr. Eddie Fenech Adami. The important difference being that Dr. Fenech Adami had not been defeated in Parliament when he tendered his advice.

The President's proclamation, published in the government gazette of the 23rd September 1996, simply made reference to subsection (5) of section 76 of the Constitution of Malta that, "in the exercise of (the President's power to dissolve Parliament) the President shall act in accordance with the advice of the Prime Minister". The official statement published on the same date consisted of a laconic statement noting that the Prime minister had received the advice and "in accordance with the Prime minister's advice the President signed two proclamations ... to hold the General Election.

The President's official statement in 1998 included two important innovations:

a) In addition to a generic reference to Article 76, and to the Prime minister's advice in terms of subsection (5)(c) of the said article, the President brought into action that part of Article 76 whereby the President may act on his own deliberate judgment. In fact it was expressly stated that *"Il-President ma deherlux li ghandu jezercita d-diskrezzjoni li jirrifjuta li jxolxji l-Parlament, kif is-subartikolu (5)(c) ta' l-istess artikolu jaghtih is-setgha li jaghmel, billi ma jqisx li huwa fl-interess ta' Malta li l-Gvern jitkompla minghajr ma tkun tezisti fil-Parlament maggoranza li ssostnih konsistentement".*

The import of this addition to the normal wording used in Presidential procla-

mations dissolving Parliament is quite fundamental in understanding the solution to the 1998 crisis. The President did not invoke the powers granted to him by virtue of article 76 (a), which allow the President to dissolve Parliament after a motion of no-confidence is carried by an absolute majority of Parliament. The President, however, neither ignored the parliamentary reality that the government no longer enjoyed Parliament's confidence.

For the first time the President granted recognition to the constitutional figure of a government that did not enjoy Parliament's confidence by the words "ma jqisx li huwa fl-interess ta' Malta li gvern jitkompla minghajr ma tkun tezisti fil-Parlament maggoranza li ssostnih konsistentement". The only logical construction to the president's use of the word "konsistentement" qualifying Parliamentary defeat is the official recognition of a situation whereby the government lost Parliament's confidence and was unable to regain it. This view is strengthened by the emphasis of the President's power act on his own deliberate judgment - "Ma dehrux li ghandu jezercita d-diskrezzjoni tieghu."

b) The second important difference between the two proclamations was that in 1998, the President directed that "Il-Prim Ministru bil-kabinett tieghu ghandu jkompli fid-direzzjoni generali u l-kontroll tal-Gvern ghal dak li jirrigward l-amministrazzjoni ordinarja, salv dak li hemm mahsub fl-artikolu 76(4) tal-Kostituzzjoni." This is important because for the first time, the administration that leads the country into the general elections was officially defined as a caretaker government limited to the ordinary day-to-day administration of the country. Another indication of an administration that lost Parliament's confidence.

It would seem therefore that we followed the conventional practice whereby dissolution of Parliament is not an immediate and automatic result of the government's defeat on a vote of confidence or a vote of no confidence. The President however, remains in such circumstances the guarantor of the proper constitutional process.

In "Il-Manwal tal-President tar-Republika", a compendium of the President's powers and duties compiled by the President, on the President's powers to dissolve Parliament, the President has this to say: " Is-subartikolu (5) ta' l-artikolu 76 jaghti setghat kbar ta' garanzija kostituzzjonali, kontra kull abbuz possibbli min-nahha ta' l-ezekuttiv." (Page 31).

To-date no such remedy of last resort was deemed necessary.

DR BRIAN BERRY[1]

THE NEW SINGLE COURT OF HUMAN RIGHTS

I. Introduction

One of the activities of the Council of Europe[2] which has been most successful in terms of bringing about real change to the lives of the citizens of Europe is the enforcement of one of the most known international documents - the European Convention for the Protection of Human Rights and Fundamental Freedoms[3] (commonly referred to as the European Convention on Human Rights- ECHR). The Convention, which next year has its 50th anniversary, can be termed as a real milestone in the history of human rights protection. It has developed through the adoption of numerous Protocols[4] some of which have added to the rights protected by the Convention, others of which have altered the procedural aspects of the Convention's operation.

The rights protected by the Convention and Protocols include the classical human rights such as the right to a fair trial in Article 6, the right to liberty and security of the person in Article 5; and the liberal freedoms which include the right to freedom of expression provided for in Article 10 and the right to freedom of assembly and association in Article 11.

The protection of human rights is stated as the Council's first aim. The ECHR and its application on a national level is the indication of the achievement of this goal in raising the profile of human rights on an international scale. The realisation of this aim has been successful only because of the mechanisms provided in the Convention for enforcing the rights.

It is this system of remedying grievances which was subjected to radical reform by the Eleventh Protocol to the Convention, which has entered into force on 1st November 1998.[5] In general, Protocol No 11 to the European Convention on Human Rights (ECHR) establishes a full-time, single permanent Court of Human Rights (the Court) to replace the Convention's original enforcement machinery. It is appropriately situated in the new, magnificent, glass-panelled Human Rights Building behind the Palais de l'Europe in Strasbourg.

It is recognised that the protection of individual human rights through the mechanisms as provided in the original form in the Convention has proved to be the optimum method to attain its objectives. However, as the Chairman of the Informal Ministerial Conference on Human Rights stressed,[6] the Convention risked becoming a victim of its own success. The length of time of individual proceedings, back-log of cases, the mix of executive powers in the judicial process necessitated the need of reform. This need was increased by socio-political changes taking place in Europe.

What will be dealt with in this short article is not an analysis of the substantive rights of the ECHR but a brief review of the reform to its control mechanisms, which in essence lie at the crux of the Convention itself. Due to lack of space only the salient points of this reform are considered. A list of reference works can be found at the end for further reading.

Given the ever increasing number of applications submitted before the enforcement organs of the Convention and the increasing number of Member States, the important question is whether this new reformed system is better able than its founding international document in protecting human rights particularly as regards managing the enormous work-load and reducing the time required for a final judgement to be reached.

II. Weakness of the Original System

Work load

The primary reason for reform was, ironically, the intensive use of this system of protection of rights. The system became more widely known in the Member States. The judgements were given particular importance on a local level and this attracted the attention of the citizens. All this served as an impetus for increased usage of the system.

The pressure of work upon the Commission of Human Rights (hereunder referred to as the Commission) and the Court is evident in the huge number of applications being reviewed.[7] The overload of work inevitably caused backlog of cases. The Commission and the Court did not have capacity to deal with the incoming claims. One contributing factor was that the judges were only employed part-time.

The result of this enormous workload was that the Commission and the Court

were not able to perform their tasks within an appropriate length of time. This was in stark contrast to the exacting view taken by the Court of Article 6(1) of the ECHR, according to which Member States' courts must deliver judgement within "a reasonable time".

Procedure of Judicial Nature

The original structure of enforcement of the ECHR was formed by the elaborate interplay of the Commission, the Court and the Committee of Ministers. A close look at the proceedings raised another weakness: this arrangement lacked a pure judicial mechanism. In practice it was difficult to accept any aspect of the procedure before the Commission and the Committee as being truly judicial.

Admittedly, the Court was and still is a genuine international court which reaches decisions after a an open public, adversarial process of written and oral argument. This, however, cannot be said of the other two organs.

Proceedings before the Commission were confidential and took place in camera. According to the old Article 31(2) the report of the Commission was transmitted to the Committee of Ministers and to the State concerned, though initially, not to the petitioner. If an application was declared admissible by the Commission, the Committee of Ministers took the final decision if the case was not referred to the Court.

The Committee was a purely political body. Its members were not judicially independent but government representatives subject to governmental direction. Its proceedings were also confidential. The Member State was permitted to take part in the proceedings, but the individual applicant had no right to be heard.

The old structure was the result of the political compromise made in drawing up the Convention and without which the introduction of the machinery would certainly have been impossible. Although these defaults were a necessity at the inception of the Convention, there was no legal justification for their existence, and reform was called for.

Duplication of work

Another weakness was that in the working of all the enforcement machinery there was substantial overlap between the functions of the various organs. This meant that work performed by one organ was identical and often duplicated by

another organ. Both the Commission and the Court examined the admissibility of an application. If the Commission declared an application admissible, Member States could present their objections with respect to admissibility to the Court. More importantly, both the Commission and the Court examined the question of a breach of the Convention in the same manner.

Increase in Member States

One important consideration was that the enforcement system was created for a small number of Member States - ten or twelve. Currently the number of Member States parties stands at forty. It goes without saying that this factor radically challenged the control system. The capacity of the system was overloaded and decision-making process was being rendered more difficult with every new ratification increasing the membership of the Convention organs through more representatives.

III. The New System

While there was a general agreement between the Member States that a radical reform to the ECHR was unavoidable, consensus on the details took considerable time. In the preparatory sessions, the replacement of the Commission and the Court by one permanent court was the most debated issue in the preparatory discussions. On the other hand, unanimous agreement was reached on the abolition of the quasi-judicial competence of the Committee of Ministers. Due to the far-reaching modifications being proposed, it was finally decided that the Protocol would create a wholly new text for the Convention, while leaving the content and the order of the human rights guarantees in Article 1 to 18 intact.

Protocol 11 gives effect to the idea of merging the Commission and the Court and having a single court as the sole organ under the Convention.[8] It dissolves the Commission and reduces the function of the Committee of Ministers to monitoring the execution of the judgements of the Court.[9] Article 19 provides for a European Court of Human Rights which is to function on a permanent basis, operating full-time in Strasbourg as the sole judicial organ. The Court now consists of three-judge committees, seven-judge Chambers and a Grand Chamber with seventeen judges. The Court has a plenum which is responsible for administrative duties.[10]

Operation of the new procedure

As under the past system, individual applications and inter-State applications

will exist side by side. What is important is the abolition of the optional character of the individual's standing in proceedings before the Court. All applicants[11] will have direct access to the new Court. The new Article 34 explicitly confirms the individual's right to bring a case before the Court. So, the right of individual petition is now compulsory and the competence of the Court will apply to all the Member States.

As the secretariat of the Commission used to do, the registry of the Court will establish all necessary contacts with the applicants and, if necessary, request further information. Then the application will be registered by a Chamber of the Court and assigned to a judge-rapporteur. At this stage the complaint is subjected to a preliminary investigation. Any cases that are clearly unfounded will be sifted out of the system at an early stage and they will therefore be declared inadmissible.

The judge-rapporteur may refer the application to a three-judge committee, which may include the judge-rapporteur. The committee may, by a unanimous decision, declare the application inadmissible. The decision is final.[12]

When the judge-rapporteur considers that the application raises a question of principle and is not inadmissible or when the committee is not unanimous in rejecting the complaint, the application will be examined by a Chamber. This procedure is the equivalent of the system used before the Commission.

The Chamber composed of seven judges will decide on the merits of an application and, if necessary, its competence to adjudicate the case. The judge-rapporteur will prepare the case-file and establish contact with the parties. The parties will then submit their observations in writing. A hearing may take place before the Chamber.

The Chamber will also place itself at the parties' disposal with a view to a friendly settlement.[13] If no friendly settlement can be reached, the Chamber will deliver its judgement.

The Chamber, according to the new Article 30, is empowered to relinquish its jurisdiction to the Grand Chamber. It may decide proprio motu to refer a case to the Grand Chamber when it intends not to follow the Court's previous case-law or where the case raises a serious question affecting the interpretation of the Convention or its protocols. This procedure may be adopted on condition that none of the parties objects to it. The referral of a case involving questions of this kind is known to civil and common jurisdictions. [14]

Once the judgement of the Chamber has been delivered, the parties will have three months to request that the case be referred to the Grand Chamber for a re-hearing.[15] However, this procedure will be restricted to "exceptional cases", i.e. when a case raises a serious question concerning the interpretation or application of the Convention and its protocols or a serious issue of general importance. Article 43(2) requires a panel of five judges of the Grand Chamber to determine whether the request for a re-hearing is admissible.

Although Article 43 refers to "referral" the procedure envisaged by Article 43 has little to do with a referral. It creates a form of appellate body since there is a re-hearing of the case. While the judgement of the Grand Chamber under Article 30 takes the place of the judgement of the seven-judge chamber, a decision taken pursuant to Article 43 does not. In essence, it reviews the finding reached by the seven-judge chamber so that the Grand Chamber effectively functions as an instance of review. The Chamber's judgement will become final when there is no further possibility of a referral to the Grand Chamber.

The Committee of Ministers will no longer have jurisdiction to decide on the merits of these cases and right to review decisions. However, as under the past system, it will retain its important role ands power, conferred by the Statute of the Council of Europe, of monitoring and supervising the enforcement of the Court's judgements.

IV. Evaluation of the New System

The Convention system is completely overhauled by Protocol 11. But, has the goal of remedying the defects inherent in the old system been reached ? Moreover, has the reform attained its objectives successfully ?

As a general positive note, one may submit that, after the elimination of the interplay of the three review organs in the old system the ECHR control mechanism has changed into a wholly judicial enforcement system which reflects the principle of separation of powers and the rule of law. Some specific points deserve particular comment.

One Court

The part-time monitoring institutions, the Commission and the Court have ceased to exist. The provision for legal protection by a single court will reduce the delays and prevent duplication of effort and work. Essentially it replaces the plurality of competencies which existed in the former system with a monistic

judicial structure. Only one examination is carried out - not two- to establish whether the application is admissible and the Convention violated.

Article 29(3) provides for a separate decision regarding the admissibility and merits of a complaint. Admittedly, this Article and the requirement in Article 45(1) that supporting reasons be provided for decisions on the admissibility of a complaint may create delays. This, however, is outweighed by the interests of justice which not only must be done to the applicants but must also be seen to be done.

The Court's assumption of the filter role of the Commission will avoid the Court being clogged with unreasonable applications. This would shorten proceedings. Moreover, the Court sitting permanently in Strasbourg, would enable the judges to dedicate their time wholly to decisions on applications.

The judgements of the new Court will be delivered by four or five different Chambers of seven judges each. Only in exceptional cases will there be a judgement by a Grand Chamber of seventeen. On this point, a valid submission was made by Schermers[16] that, for the development of the law one should prefer a Court of First Instance composed of judges from all European States operating in chambers and a Court of Appeal composed of seven or nine judges and charged only with the interpretation of the Convention.[17] Possibly this would constitute the last tier of the structure of the future Supreme Court of Human Rights in an amended ECHR.

Seven Judge Chambers

Article 27(1) provides for the reduction in the size of the Chambers from nine to seven judges. The increase in the number of Member States, will increase the differences in the background of the judges. These two factors can lead to insufficient representation on the Court because not all views would be adequately represented in a Chamber of seven. Nevertheless, mutual consultation between Chambers and by the usage of the referral system to the Grand Chamber would eliminate this problem. The small number of judges should make it possible to create more Chambers, increasing the capacity of the Court as a whole. This offers the possibility to tackle the problem of back-log of cases and promote the "efficiency" of the new Court.

Composition of the Grand Chamber

The national judge and the President of the Chamber concerned sitting in first instance in a Chamber of seven judges will always be able to sit in the Grand

Chamber of seventeen judges if the same case is treated "in appeal" when it is referred under Article 43.[18] Presumably this has been inserted so as to ensure consistency and uniformity of the main case-law of the new Court. However, notwithstanding the apparent valid reason for this amendment, usage of this provision may be objectionable.

In essence this procedure provides for an overlap in judicial personnel between the Grand Chamber and the Chamber which initially heard the case. Since both judges who are entitled to sit in the two proceedings will be well acquainted with the case, there is some danger that they may influence the Grand Chamber in a particular path. This may increasing the risk that the Grand Chamber will take the same path as the seven-judge Chamber before it. A judge who has taken a position in deciding a legal dispute is no longer fully independent and impartial in his position in the same dispute. Thus the likelihood of an independent and impartial review is diminished. If the Grand Chamber is to act on appeal from Chamber decisions, then the same rules for an appeal should have been applied to the hearing by the Grand Chamber.

Relinquishing jurisdiction in favour of Grand Chamber

Article 30 prescribes that a Chamber has the power to relinquish jurisdiction and on its own initiative and only in exceptional circumstances to refer the case to the Grand Chamber. This power is a clear recognition that it is the first and foremost responsibility and the duty of the Court itself to ensure the quality and consistency of its case-law.

The Chamber may adopt this procedure, and relinquish jurisdiction in favour of a Grand Chamber, only on condition that none of the parties objects to it. Most likely, the parties will not object to the Chamber referring the case. Nonetheless, the fact is that should one of the parties of the case object, it appears that this would be time-consuming and hampering the procedure of the Court. The judges will have studied the case and would have already formed an opinion on relinquishing jurisdiction to the Grand Chamber. The need to first consult the parties means that the case must be postponed for some time. Then, once the permission of the parties is obtained it must again be put on the agenda. It is hoped that in practice the parties will not object if a Chamber has made it clear that it considers adjudication by the Grand Chamber to be appropriate or even necessary.

Referral to the Grand Chamber

Under Article 43 any party to the case may request that the case be referred to

the Grand Chamber only in exceptional cases. The legitimacy of this request is verified by a panel of five judges of the Grand Chamber, inter alia, on the ground of whether the case raises serious questions affecting the interpretation of the Convention. Many applicants will suppose that this will apply to their cases and it is expected that most applicants will request referral under Article 43 to the Grand Chamber. Only when this whole procedure of Article 43 is applied in practice will it demonstrate whether the workload on the panel of judges hampers the working of the ECHR enforcement system in general or not.

Finally, the rule that where a judgement has been issued will now only be reviewed in exceptional cases, certainly should help to reduce the total time required for an application to be completely determined.

V. Conclusions

Since the drafting of the European Convention on Human Rights the idea that supervision of the substantive rights should be handled to some extent by diplomatic organs has considerably been modified. The increase in the number of applications and the widening of the membership of the Council hindered the efficient working of the system. All these factors necessitated a radical revision of the monitoring structures of the Convention.

Through the creation of a new, full-time, single Court, the elimination of the separate examination of two institutions and the recognition of the right of individual petition, the new Convention, has effectively simplified and speeded-up the procedure, making way for greater efficiency and changing the machinery into a more accessible one. Protocol 11 to the ECHR has equipped the Court with new, improved human rights protection machinery. This is being operated and will be utilised to tackle the challenges arising in a changing Europe which will have to be faced during the next millennium.

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[2] Extensive information regarding the Council of Europe and human rights documentation is available via the internet from the Council of Europe web-site at http://www.coe.fr
[3] The European Convention on Human Rights was signed in Rome on November 4, 1950, and entered into force with its tenth ratification on September 3, 1953.
[4] Eleven so far.
[5] Protocol 11 to the Convention was adopted by the Committee of Ministers on 20 April 1994 and opened for signature by Member States on 11 May 1994. It was signed by all 40 Council of Europe Member States and ratified by all thirty nine Contracting States Parties to the ECHR.
[6] On November 1990, in Rome.
[7] Approximately 22500 applications were pending between 1975 and 1980, by the end of 1990 that figure had risen to over 50,000 applications. See *Survey of Activities and Statistics of the European Commission of Human Rights* 1993, Council of Europe.
[8] The idea was introduced on a political level by the Swiss government in the Ministerial Conference on Human Rights in Vienna in 1985.
[9] Article 46(2) et sequitur.
[10] Article 26 regulates the plenary Court.
[11] Article 34 refers to : any person, non-governmental organisation or group of individuals.
[12] Article 28.
[13] Articles 38 and 39.
[14] In the Maltese legal system, a similar procedure of referral is found in the Constitution in Article 46(3).
[15] Article 43(1).
[16] Mr Schermers was a member of the European Commission on Human Rights.
[17] See Schermers, *The Eleventh Protocol to the European Convention on Human Rights,* (1994) 19 ELRev 367, at 380-382.
[18] Article 27.

RUTH FARRUGIA[1]

PARENTAGE AND HUMAN RIGHTS: THE CHILD'S POINT OF VIEW[2]

It is tempting to write of child rights and their recognition as human rights within the sphere of parentage. It is similarly inviting to study the shifting parallels between rights and duties and the obligations set out under parental responsibility. The growing concern for children over the past centuries has been steady and unabated, although its real results have yielded divergent products depending on their geographical distribution.[3]

Instead of dealing with this cataloguing of rights or entering into the debate whether such rights actually exist[4], this paper will try to answer at least some the following questions the author has been faced with in family law practice:

1. Is it a right to know one's parentage ?
2. Is it a right to receive parenting ?
3. If affirmative, does the violation of the right to receive parenting imply restitution ?
4. If a parent does not provide parenting, does the duty automatically fall on the State to supply an alternative ?
5. If affirmative, does the violation of the right imply restitution ?
6. What is wrongful or inadequate parenting ?
7. Who decides what is the right kind of parenting ?
8. May the child seek to "divorce" parents on the above grounds ?
9. Is acknowledgment by a parent of a child an intrusion on his family life, where this is being enjoyed with persons other than genetic parents?
10. Within adoption, may a child demand restitution from the biological parent and / or the State where:
a. placement of the child has been unsuccessful ?
b. the biological parent has intruded on the child's adoptive family without the child's consent ?
c. one bioligical parent has knowingly concealed the identity of the other biological parent or wilfully misled the adopted child about his/her parentage?

In order to answer the first question regarding the right to know one's parentage, some attempt must be made at defining parentage and in ascertaining the extent to which parentage implies the attribution of the legal status of parent. It is clear that recognition of certain people as the parents of a child may depend upon different aspects of the parenting role.[5] One may identify the "psychological parent" to whom the child relates emotionally in early life[6], the social parent as the person who performs the caring role for the child and the natural parent.[7]

In the light of Johnson versus Calvert decided by the Supreme Court of California, the law would seem to be making a marked distinction between legal parenthood which implies the status of parenthood and parental responsibility which grants the power to act as a parent. The law had always assumed the biological truth of a child never having more than two parents at a time, but it has been shown that two mothers are possible in the case where a surrogate mother leases her womb for gestation of another woman's fertilised egg. [8] What is the child's position in such a case?

The act of birth of such child according to Maltese law would include the names of the birth mother and father registered as such. Can the genetic mother insist on her name being entered in the certificate of civil status, particularly where she will be caring for the child? Can a child demand to know the identity of the father where artificial insemination has taken place ? At present, insufficient local legislation regulates the complexity of issues that arise through the achievements of science. However, it should be possible to conclude whether the child has any right to knowledge of parentage ab initio, as a matter of principle.[9]

Another question considers the right to receive parenting and asks whether the failure to fulfil this responsibility incurs any form of liability? The United Nations Convention on the Rights of the Child makes provision for States Parties to respect " the responsibilities, rights and duties of parents ..... to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance..."[10]

This would therefore seem to be the authority or power given to parents in making decisions in the best interests of their children. Children are not usually perceived as having any right in what kind of parenting they receive, if indeed they receive any at all.

This issue has been examined from the obverse side of the coin. It has been put forward that parents have the power, authority and interest in the upbringing of their children and there would seem to be no real way to ensure compliance on behalf of the child. What happens where a child adamantly refuses to obey a parent who is giving an order in what he/she considers the child's best interests? [11] The most exemplary case that springs to mind is that of Gillick[12] where the Court of Appeal emphasised the importance of preserving parental authority and saw itself as protecting parents against any infringement of their right to control children up to the age of eighteen.

Although the actions of parents are vital to the well being of most children, it is a sad reality that some children receive little or no care for one or several of a variety of reasons. Whether the State has a duty to intervene on behalf of these children has always been a dangerous standpoint in view of the inviolable privacy of the family. The Courts are always ready and willing to make any necessary decisions in the best interests of the child.[13] But, they must first be seized of the case. This implies that the child must have access to the court or to some person who can make the link. Does this undermine the authority of parents? Is it the role of the courts to intervene where a child has been chastised by parents who have the genuine best interests of their child at heart?[14] However, chastisement can come in many forms. Physical punishment has been subjected to scrutiny in recent years with some states going so far as to reprimand the parent who slaps a child in public.[15]

The right of the child to receive quality care from parents has never been put to the test, although the repercussions where this is lacking are all too obvious. Should it become apparent that the child is being neglected or harmed, either physically or psychologically, the State has a duty to help the family and if this fails, it has the responsibility to provide an alternative.[16]

A further issue for discussion relates to the intrusion of a parent in the family life of a child settled with persons other than his biological parents. A child has the right to privacy and to develop in a safe and secure environment without undue interference. The impact of a visit by an unknown or estranged biological mother or father may be detrimental and places psychological pressure on the child which is avoidable.[17]

Although many legislations provide for the meeting of adopted persons with their biological parents, there are alvveys parents (and children) vvho taken

short cuts just as children who have been settled in a foster family for years may be faced with an unwanted visit by a parent who suddenly decides to turn up and demand access. Children can do little to control these actions, but the legislator could make such disruptive influences less frequent by imposing sanctions where liberties are taken to the detriment of the more vulnerable.

The opposite state of affairs is also worthy of discussion. May a child demand to have access to a birth parent where this parent refuses it? Although such access may be granted[18] this does not imply that the parent will provide due care and attention which is needed by the child.

All the issues raised in the context of the rights of the child to receive parenting beg the question as to the standards of adequate parenting. Such a definition would be hard to come by although many legislations set out a basic minimum standard to which all children are entitled.[19]

The law takes it for granted that parents always act in the best interests of their children. This assumption ensures that responsibility for the care of children is uppermost in their mind and in their actions. Should this not be the case, the United Nations Convention on the Rights of the Child provides children with a voice to make their opinions heard. [20] Whether state signatories have translated this into a reality is another matter.

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[1] Dr Ruth Farrugia is a practicing advocate and lecturer in Civil Law at the University of Malta.

[2] This is an abridged form of a paper presented at the XXVIIth Colloquy on European Law on Legal Problems relating to Parentage held in Malta in September 1997 by the Council of Europe (CJ-FA/COLL(97)Paper 3)

[3] Stone Lawrence, The Family, Sex and Marriage in England, 1977, p.683 quoted in Therborn, Goran, Children's Rights since the Constitution of Modern Childhood., International Conference on Children as a Social Phenomenon, Billund, Denmark, September 1992, European Centre Report, 1993, p. 1504Professor Onora O'Neill for instance queries whether children's positive rights are best grounded by appeals to fundamental (moral, natural, human) rights. She feels that the ethical position of children's rights can be further secured if they are not based on claims to fundamental

rights. Children's Rights and Children's Lives printed in Children, Rights and the Law, edited by Alston P., Parker S and Seymour J, Clarendon, 1993, pp 24 - 42.

[5] Barton C. and Douglas G., Law and Parenthood, Butterworths, 1995, pp.47 - 50.

[6] Goldstein J., Freud A. and Solnit A., Beyond the Best Interests of the Child, 1979, Burnett Books.

[7] The definition of natural parent is continually undergoing change, particularly in the light of contemporary possibilities of artificial procreation.

[8] Panelli J. "..... To recognise parental rights in a third party [i.e. the gestational mother] ..... would diminish [the genetic mother's] role as mother." quoted in Morgan D., A . Surrogacy Issue: Who is the Other Mother ? 1994, 8 International Journal of Law and Family 386.

[9] The United Nations Convention on the Rights of the Child ratified by Malta on the 30th September, 1990 at Article 7 (1) states: The child shall be registered immediately after birth and shall have the right from birth to a name and, as far as possible, the right to know and be cared for by his or her parents."

[10] Article 5.

[11] Seymour John, An Uncontrollable Child, in Children, Rights and the Law, op. cit., p. 1 15 121985, 1 All ER 533.

[13] 'Maltese courts, for instance, may "revoke or vary" any directions within a separation process "for the better welfare of the children" Section 60 (1), Chapter 16 of the Laws of Malta.

[14] In New Zealand, the Domestic Violence Act 1995 makes it possible for an abused child to obtain a protection order against a parent. Atkin B., Dealing With Family Violence: Family Law in New Zealand, 1995, International Survey of Family Law, 1995, pp. 383 - 400.

[15] Case of Miller, reported in the British press in 1996.

[16] In many states, children in need of care, protection or control are taken into a care setting or placed with foster carers. The impact of such proceedings on the child is another matter of contention.

[17] Case of X, still suh judice in the Civil Court, Malta, where an unmarried mother registered her daughter in her surname only to find after five years that the father of the child had acknowledged her and given her his surname, although he had no contact with them. Proceedings are pending regarding the right of the child to be known by her mother's surname and for disavowal of her father.

[18] Case of Jeroen, Nederlands Juristenblad 1996, afl. 3, bijlage, at 41 cited in Forder C., Re-thinking Marriage, Parenthood and Adoption, International Survey of Family Law, 1995, pp. 378-379 The Amsterdam Appeal Court, based on Art 7 of the United Convention on the Rights of the Child, concluded that the presumed father was not free to reject all contact with his son and that the court was empowered to take steps to realise Jeroen's right. The Dutch Supreme Court overturned the decision on the basis that there had been an incorrect interpretation of Article 8 of the European Convention on Human Rights and because the defendant had not recognised Jeroen. Proposals have since been presented before the Dutch parliament to remedy this situation.

[19] "Marriage imposes on both spouses the obligation to look after, maintain, instruct and educate the children of the marriage taking into account the abilities, natural inclinations and aspirations of the children." Section 3B, Chapter 16, Laws of Malta, This

also applies where children born outside marriage are acknowledged by the father. If no such acknowledgement takes place, the responsibility rests with the mother under the presumption: mater semper certa est.

[20] Article 12: 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely, in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

DR HUGH PERALTA

THE EROSION OF PROPERTY RIGHTS; POLITICIANS AND POLITICS

According to Roman Law the dominus had the real right enforceable against the whole world of using his land, (from beneath the soil up to the heavens) enjoying it and indeed destroying it, in an absolute manner.

This is chronologically and conceptually very far from today's position obtaining locally. I am prompted to write on this subject as certain letters have recently appeared in the press (as happens periodically) complaining about the unfair situation effecting property owners in Malta. Other countries passing through the same original requirements have enacted corrective legislation.

The basic point is the unfairness and injustice suffered by property owners.

A list of such discrimination must necessarily start with the notorious Rent Laws.

These **Rent Laws** impose an enormous injustice on the landlord. They practically deprive the owner of all his property rights - and on succession impose a transfer tax. The tenant is entitled to total maintenance of the premises (upon payment of only a peppercorn rent) with security of tenure for his family, descendants etc. This in itself gives rise to an injustice. When related third parties then avail themselves of this law in order to inherit the tenancy upon the demise of the original tenant (even if they do not indeed need financial assistance - rather the opposite may well apply) this injustice becomes enormous. The Decontrol Laws at one time were a relief to this injustice; then under Mr Mintoff the clock was put back again. The legislation effecting future rents as from June 1995 is only of partial solace. It does not remedy the unfair situation for those landlords who have now suffered this injustice for over sixty years.

Requisition Orders were at one time the scourge of the innocent landowners. In their heyday in the 1970s and 1980s the sudden "expropriation" - contrary to the motives that introduced Decontrol - was the feared axe. The vestiges of this Law - now happily on its way out - are still felt to this day.

Mr Mintoff's Labour Government further burdened the property owner when amending the **Housing Decontrol Act** in 1979. The Government basically granted the temporary ex-emphyteuta and the tenant, the right of acquiring the property at a low cost, instead of honouring their contractual obligation upon the termination of the temporary emphyteusis of returning the premises with vacant possession to the property owner. Mr Mintoff may have intended to deal a serious blow to the Church because of its property: however in the law there is no such limitation - it applies to all. The end result is that a fundamental property right was removed at the stroke of a pen. Admittedly this legislation is being contested and a final judicial decision is still awaited.

The coup de grace came in 1992 when the Nationalist government created as has been said, an "uncontrollable monster", "a state within a state". Well meaning though it may have been, the **Planning Authority** has an intrinsic set up which faults one of its "raison d'être". Meant to act as a control over whimsical ministerial decisions, it can now act uncontrolled by whimsical technocrats who are in practice similarly unaccountable. Although I am sure that judicially this unaccountability will one day end in personal responsibility, the fact remains that at present property rights have been reduced drastically through this legislation.

The desired dealing with similar applications in the same area in a uniform manner - is still desired. This effects property owners/developers drastically.

"Scheduling" for aesthetic, social, historical, archaeological or other reasons - practically decided by individual technocrats, is tantamount to expropriation, without compensation. It is well known that in some cases of scheduling two nearby houses enjoy different fates: one may be converted into flats and property worth thousands, the other becomes scheduled - and its landlord impoverished. If scheduling is to be had then any financial suffering is to be made good for by the state. It is very easy for a technocrat to schedule other people's property; with other's goods, individuals may well feel lavish. I still have to learn of the case where a technocrat has scheduled his own property.

Furthermore certain districts are disadvantaged when compared with others. I refer to property owners who cannot convert their property to a use previously permitted, because they live in a particular district. I refer to Valletta and the conversion of vacant property to office premises. Of course the application of this rule depends on street to street, or rather from applicant to applicant.

Another diminution of property right emanating from the same legislation is the prohibition of a minute nature (e.g. that one cannot plant trees of a non-indigenous nature in one's own property). The irony of it all is that after that one plants an indigenous tree, the property may eventually be scheduled because of the historical importance of such a tree.

Finally (at least for this article - I will resist the impulse to write further on the Planning Authority) under its Chairman, Fabri, the Planning Authority had the cheek and arrogance to suggest a further hardship on the long suffering property owner, by proposing a levy on vacant property. Luckily (or is it because it effects many voters?) this suggestion has not been taken up by the political parties.

The Planning Authority - and the Housing Authority needs to take note - must realise that it is the carrot that provides true and long lasting solutions.

Expropriation for public use with compensation (which is often meagre) is also a diminution of property rights. This type of expropriation is protected by the Constitution and is more understandable; but it often creates unfairness especially when compensation takes many years to be paid or in comparing cases is found to be grossly disproportionate.

Politicians have been included in the title as obviously the situation is a legislated one and politicians are responsible in toto for the same. Politicians have supported this legislation throughout various administrations mainly on the ground that such legislation was necessary because of social economic and political reasons. I am in favour of owner occupied housing as well as distribution of wealth. It avoids hiccups in the country and great steps have been achieved in this regard. However robbing Peter to give to Paul (and thereby win Paul's vote) is still theft. In some legislation and vis-a-vis some politicians such motivation may have been genuine. I doubt the motives of certain politicians in some cases. The fact remains that this legislation effects adversely the minority and enriches enormously a majority - a majority who

were not entitled to or indeed justified in receiving such enrichment. The barter is the people's votes for such acts, at the expense of the property owner. Clearly such legislation is a vote winner for the politician. At least this was the case in the past. Doubts may be expressed as to whether this situation still actually prevails in Malta.

What can be done administratively/legislatively? In the past Commissions have been set up with the task of making suggestions to Government. They have also gathered suggestions from individuals. I am sure there are many worthwhile suggestions which have been offered (e.g. Notably the comments by The Chamber of Commerce: STOM 31.5.1998). My suggestions singularly, alternatively and/or cumulatively are the following.

Regarding: Rent Laws

The rent laws can be declared to become gradually ineffective in say five years' time. When a landlord desires to sell his property a fair price should be established, however taking into consideration the fact that the property is leased. If the tenant does not accept to buy this property at a subsidised price and if necessary financed, then the protection given to the tenant by the rent laws should not apply. Where the raison d'être of the protective legislation does not in reality exist, as can be established by a means test effected on the tenant and/or his family, then the protection of the rent laws should not be had.

The protection of the decontrol laws given to the Maltese tenants are to be repealed.

Regarding: The created rights of the ex-emphyteuta/tenant upon the expiry of the temporary emphyteusis

The imperative rule of giving effect to a contract freely entered into and the principle that no retroactive legislation should be enacted such as to adversely effect an innocent contracting party, should be foremost and be applied. As such the legislation enacted under the Housing Decontrol Act (in 1979) giving the ex-emphyteuta and the tenant basically the right to rent the property in perpetuity or outright buy the property should be immediately repealed.

Regarding: The Planning Authority

Vis-a-vis the better functioning of the Planning Authority, clearly the proposed national conference announced by the Minister, Tonio Borg could be a step in the right direction, although one may ask what was the outcome of the post 1987 election public dialogue meetings. However the good intentioned 1997 amendments and the encouraging correct words of Architect George Pullicino (The Times 15.12.1998) become easily thwarted and stultified if the persons applying same are not accountable and/or do not have the genuine intention of being customer orientated. No amount of legislation rectifies such a situation. Set minds do not change. The solution is clearly written on the wall. Having said that on "personalities" I would like to express my full confidence in the present Chairman Mr Chris Falzon. I also think that the appointment of an ombudsman and/or executive regulator would be a step/s in the right direction. The 1997 amendments could also be amplified - restricting the PA's powers (particularly in inserting the small print to thwart the whole pro customer process) and protecting further the customers' interest. Accountability and personal responsibility is a must.

What can be done politically? It is an abundantly clear fact that the above laws are unfair. Everyone, even those who unfairly enjoy their benefits are fully aware of this basic fact. Yet the politicians do not do that which is necessary to remedy the unfairness of the situation - and this because they fear that the majority of voters will not support such just legislation. The morale of the story is that some politicians do not enact just laws, but only those that favour them. This of course is in itself immoral. Theoretically this argument may well be applied a contrario. Politicians are recently correctly intoning against the immorality of tax evasion. I support such speeches. However the above said example of the politicians, who whilst fully aware of what morally correct legislation should be enacted, yet do not so enact, constitutes in itself a bad example. Cannot the suffering citizen say that he will abide by enacted legislation including "no" to tax evasion - only if the legislator on his part abides by his side of the bargain and remedies the unfair rent laws etc? In other words: if these laws are not amended, other laws may be disobeyed. Clearly two wrongs do not make a right - but the principle of self defence equally applies.

The correspondent Mr L F Grech, stated that he will not vote unless in favour of a party which remedies this unfair situation. This is a plausible suggestion,

politically correct, but unless followed widely, probably practically ineffective. My suggestion is that a pressure group of property owners and their supporters should be formed who should then exert their pressure on political parties. The hunters seem to have been successful in their lobbying. Why not the property owners?

It would seem that this is the only language some politicians understand.

DR GIANFRANCO GAUCI

THE EVOLUTION OF THE CONCEPT OF RISSA IN MALTESE LAW WITH REFERENCE TO SECTION 237 OF THE CRIMINAL CODE

As a manifestation of violence, brawls have always been one of the most common problems with which the authorities that be have had to deal with in order to maintain the public peace. The concept of *rissa* or accidental affray has therefore by necessity developed since early times as a criminal offence, the typical *actus reus* of which would have consisted exclusively in participation in such a fight; times have changed to such an extent that nowadays such an offence exists neither under English nor under Maltese law, but modern regulation will be analysed later on.

In the early codes of law enacted by the Knights of St. John, *rissa* as an offence does not appear immediately although much attention is given to duels. Reference is made in particular to the *Pragmaticæ Rhodiæ* of 1509, enacted in Rhodes, the *Statuta et Ordinationes* of Grandmaster de L'Isle Adam, enacted on the 3rd of September, 1533, the *Pandectæ et Ordinationes* of D'Omedes, dated 1553, the so-called *Codice di Verdala* of 1593, and the *Prammatiche Magistrali* enacted by Lascaris in 1640, together with the 1666 additions of Cottoner. Incidentally, under Italian law, duel could possibly be considered as *rissa*, if one were to agree with Carrara[1] and Manzini,[2] who are of the opinion that a fight between two individuals is enough to constitute a breach of Section 588 of the Italian Penal Code, but the concepts and considerations involved are of little relevance to the concept of *rissa.*

The earliest application of the word *rissa* in a Maltese legislative context is to be found in the *Prammatiche Magistrali*, compiled by Massimiliano Balzano at the request of a commission appointed by Grand Master Nicholas Cottoner, and enacted by Grand Master Gregorio Caraffa in 1681. *Titolo Vigesimo 1º*

deals with offences against the person, and VI deals with homicide committed in prison, including *"qualunque homicidio etiam casuale, et accidentale,* ***come sequito in pura rissa senz'animo di ammazzare****"*, which it punishes with death. In X, however, *rissa* is dealt with exclusively:

X

> Succedendo qualsisia tumulto, o rissa tra più persone, quali daranno di mano all'armi, come sone spade, pugnali, coltelli, o altre simili, essendovi più d'uno per parte, incorrano I contraventori alla pena di cinque anni di Galera, dando facoltà ai Giudici d'alterare, et accrescere detta pena, attese le circonstanze del caso, e numero di persone.

Here we find that what was especially punished was armed participation, participation with what would be considered as arms proper. The same provision was re-enacted by Grandmaster de Vilhena in the 1725 *Leggi e Constituzioni Prammaticali*, better known as the *Codice di Manoel*, with minor orthographical corrections. The year 1784 then saw the enactment of the *Dritto Municipale di Malta*, better known as the *Codice de Rohan*. *Rissa* is exhaustively dealt with in Book 5, Chap. 3:

VIII

> Quante volte nella rissa accidentale seguirà ferimento grave, o debilitazione di qualche parte del corpo cogli urti dati, pugni, o con colpi di legno, o pietre; il primo che avrà messo le mani sull'altro, ovvero il provocante sarà punito colla pena del servigio alle opere pubbliche con catena per un anno, ovvero ad anni tre o più di galera, oppure all'esilio a tempo o in perpetuo, secondo le qualità delle persone, avuto riguardo alla maggiore o minore ferita o debilitazione di membro; ed in oltre dovrà risarcire tutt'i danni, spese, ed interessi alla parte lesa: e non costando chi abbia dato principio alla rissa, o chi sia stato il provocatore; ambidue soggiaceranno alla pena di carcere per mesi due, e colui che avrà leso l'altro, dovrà pagargli i danni, ed interessi.

IX

Nella stessa pena, e nell'obbligo medesimo incorreranno tutti quei, che saranno stati corrissanti, e saranno per le spese e danni tenuti in solido.

X

Chiunque nelle risse, eziandio accidentali, quantunque insorte tra altri, prenderà in mano per rissare armi proibite, così da vicino come da lontano, incorrerà nella pena di galera per anni dieci; quante volte non sarà sequito alcun ferimento, e non sarà stato autore della rissa: nè potrà suffragargli, per esimersi da tale pena, la licenza di ritenere le dette armi, o che non si fosse servito di tali armi proibite.

XI

Succedendo qualsisia tumulto o rissa tra due persone, che daranno di mano alle armi proibite, essendovi più d'uno per parte, soggiaceranno tutti alla pena di galera per anni dieci; purchè non ne fosse sequito ferimento od altro danno.

XII

Se però in ambidue i casi annoverati ne' *preced. X. e XI.* sarà sequito ferimento o altro danno, la pena sarà di galera a vita.

XIII

Ma se tale tumulto o rissa tra più persone, succederà dando di mano a pietre o legni, e non sarà seguito danno notabile; la pena sarà di galera per anni tre sino a cinque: ed al giudice s'accorda la facoltà di commutarla per lo stesso tempo o nel servigio delle opere pubbliche, o nell'esilio, avuto riguardo alle qualità delle persone, ed alle circostanze del caso.

As can be seen, the *Codice de Rohan* treated the problem from various points of view, with different punishments for the provocator, for any person found to have actually harmed the victim, for participators with arms proper and participators with arms improper, and even for cases where no arms improper are used and no bodily harm occurs. The criminal law provisions of the *Dritto Municipale* remained in force until the enactment by Order-in-Council of the Bonavita Criminal Code in 1854, yet it seems that these provisions had long since ceased to be applied; such was the case, at least, in the four judgments regarding *rissa* reported in the first collection of law reports published in Malta; the 1839 and 1840 *Collezione di Decisioni dei Tribunali di Malta*, edited by Sir Antonio Micallef. In Decision XXIX,[3] enunciated by the Criminal Court presided over by Dr. Gio. Batta Satariano and Dr. Pasquale Grungo, Judges of Her Majesty, on Tuesday, 12th November, 1839, Giovanni Carabott of Zejtun was found guilty of *"ferimento commesso in rissa e nel calore dell'iracondia"*, and condemned to *"servizio nelle opere pubbliche con catena per anni tre."* In this report, no mention is made either of the circumstances of the case or of the law applied.

In a subsequent judgment,[4] delivered on Saturday, 16th November, 1839, by the Criminal Court composed in the same manner, Francesco Mercieca, from Gozo, was accused of *"furto e* [...] *ferimento grave e pericoloso commesso in rissa, ma senz'animo di uccidere."* Of particular interest is the editorial commentary, by Sir Micallef:[5]

OSSERVAZIONE.

(1) La pena del furto è stabilita nel 1 del proclama del 26 aprile 1825 riportata nella prima osservazione alla decisione XXX e **per quel che concerne la pena applicabile all'altro delitto, come pare, la corte, stante il difetto di una legge che la potesse regolare, ha dovuto arbitrare, giacchè secondo il diritto municipale lib. 5 cap. 3 8 quante volte nella rissa accidentale siegue ferimento grave o debilitazione di qualche parte del corpo cogli urti dati, pugni, o con colpi di legno o pietre, il primo che mette le mani sull'altro deve essere almeno punito colla pena del servizio alle opere pubbliche con catena per un anno, e giusta il 12 dell'istesso capo, seguendo il ferimento con armi proibite, la pena è di galera a vita.**

Although the Editor quotes the *Code de Rohan*, the Court does not seem to have made any mention of its provisions, and in fact does not apply the punishment laid down in it, preferring to apply its own discretion.

The same kind of offence was contemplated in two cases the following year, both of which were decided by a Criminal Court composed of the same two judges as in the preceding cases, but this time presided over by Sir Ignazio Gavino Bonavita himself, the (future) compiler of the Criminal Code. In these two cases we find a much more detailed narration of the events, so that it is easier to assess what was meant by the term *rissa accidentale*. In the first of these two cases,[6] decided on Monday, 17th August, 1840, Natale Xerri was accused of *"ferimento pericoloso e grave commesso senza giusta e ragionevole causa"* upon the person of Francesco Micallef, consisting in three bodily wounds caused by a knife. The Crown Advocate produced as eye witness P.C. Giovanni Borg, who had seen the accused and Micallef *"azzuffati dibattersi per terra, il prigioniere avendo in mano un coltello, ed il Micallef una pietra, e dando furiosamente colpi l'uno all'altro reciprocamente."* This happened after a drinking session in a *bottega* in Birkirkara, and the reason for the fight was not determined with certainty, so that the Court found the accused *"reo nel ferimento espresso nella denunzia e commesso con coltello, ma in rissa, ed essendo esso Natale in istato di qualche grado di ebrietà."* Regarding the law to be applied, the following passage gives the views of Sir I.G. Bonavita:

> **Sentiti poi i defensori sull'applicazione della legge, il presidente rilevò, che il caso non cadendo sotto alcuna sanzione dello statuto patrio la pena rimaneva rimessa al prudente arbitrio della corte,** e che stante le scuse dichiarate e nascenti dalle circostanze della rissa e dal grado di ebrietà del prigioniere al tempo del commesso delitto, la corte si sarebbe determinata ad una pena più mite di quella che stava per applicare, se nel caso non concorresse la circostanza aggravante del coltello, egualmente dichiarata nella decisione del fatto. E quindi la corte condannò il prigioniere al servizio nelle opere pubbliche con catena al piede e senza stipendio per un anno.

The second of these two cases[7] was decided on Friday, 27th August 1840, by a Criminal Court composed in the same manner as the preceding one. In it,

Giuseppe Borg was charged with *"attacco personale e ferimento pericoloso e grave in persona di Carmelo Bonnici"*, which consisted of a wound in the abdominal region produced by the defendant's knife, which resulted in Bonnici's death thirty hours later. The Court decided the case as follows:

> "La corte dichiara di costare della reità del prigioniere Giuseppe Borg di ferimento pericoloso e grave in persona di Carmelo Bonnici in consequenza del quale ferimento esso Bonnici cessò di vivere: commesso tale ferimento con coltello volgarmente detto serratore in una rissa provocata dal suddetto Bonnici e ripetutamente da lui attaccata con nuove e gravi provocazioni, dopo di essere stati separati da altri i due corrissanti, ed avendo l'accusato inflitto il ferimento, mentre egli agiva sotto l'impulso del dolore derivato da una seria morsicatura cagionatagli nel pollice della mano destra dal ferito nell'atto della rissa." Deciso in questi termini il fatto, e sentito l'avvocato della corona, il quale allegò che **la legge nel caso come era stato dichiarato rimetteva la pena alla prudenza della corte,** come pure l'avvocato per la difesa il quale insistè perchè non essendo risultato, che il prigioniere avesse agito con dolo, si dovesse al più decidere, che la carcerazione fin'allora sofferta dovesse cedere in luogo di pena, il presidente rilevò, che dalla dichiarazione della corte pronunziata sul fatto, venendo escluso il moderame dell'incolpata difesa, non poteva dirsi che il prigioniere avesse agito senza dolo, ma all'incontro bisognava considerarlo reo del ferimento a carico suo dedotto nell'atto di accusa, sotto le circostanze bensì espresse in quella dichiarazione - che queste circostanze, le quali per ciò che concerne il piacere del prigioniere, consistevano nel dichiarato impulso del dolore e della dichiarata rissa, costituivano veramente una scusa del delitto, ma giammai la non imputabilità del fatto, e quindi potevano come circostanze le quali non escludevano il dolo, ma si bene in qualche maniera lo attenuavano, operare in mitigazione della pena, che deve essere applicata per un ferimento grave sequito

> dalla morte, come fu espresso nella decisione del fatto, e considerato sotto tutte le circostanze del momento in cui fu commesso, e non mai avere per effetto la totale esenzione dalla pena, e quindi pronunziò la seguente sentenza della corte "La corte condanna il prigioniere Giuseppe Borg al servizio nella opere pubbliche con catene al piede e senza stipendio per anni due."

From these four judgments an idea may be made of the concept of *rissa* as obtaining before the introduction of Section 227 of the 1854 Order in council. First of all, whereas participating in a *'rissa'* under Italian law or even in an 'affray' under English law constitutes an offence in itself, nothing of the sort is envisaged in these cases; this also happens to be the main point of difference between the corresponding provision in the Codice Rocco and that in the Codice Zanardelli. Clearly, in these instances the fight was only taken into account in order to determine the degree of criminal intent, or *'dolo'*, yet the impression is given that, *'dolo'* being established, the fact that the offences were committed during a fight constituted a valid ground of excuse. This point is in fact made by Carrara[8] in relation to the concept of *rissa* under the old Italian Code.

Another interesting feature of this concept is the semantic meaning attributed to the word itself; there doesn't seem to be any difference between the word *'rissa'* as used in these cases and the word 'fight', although the meaning attached to it in Italian law equates it rather with the word 'brawl', implying participation by more persons. A comparison with the concepts of *'rissa'* under Italian law and 'affray' under English law will illustrate my meaning. According to Antolisei,[9] *'rissa'* implies more than a simple *"alterco violento fra due individui"*. Although Manzini[10] and Pannain[11] are of the opinion that the participation of two persons is enough to constitute the said offence, according to others, such as Antolisei[12] and Di Vico,[13] at least the involvement of three persons is required. Masi goes further; according to him, at least two groups of persons must be opposed with at least two individuals per group, so that one can only speak of *'rissa'* when at least four persons are fighting, equally divided.

It is however to be kept in mind that in the cases discussed above, the participation in the affray is not considered as an offence in itself, requiring an *actus reus* and a *mens rea*, but rather as a test to measure, in a sense, the extent to which the accused was conscious of his actions whilst he was perpetrating

them. In other words, participation in an affray is here being considered from a subjective point of view, and no assertion is being made that, objectively speaking, the affray constituted a full-scale *'rissa'*, implying breach of the peace, a particular number of participants, or any other kind of criminal element.

Comparing this notion of *'rissa'* with the English notion of affray, on the other hand, brings out an even deeper incompatibility; not only is affray regarded as an offence in its own right, but furthermore, it is only dealt with from the point of view of the protection of the public peace. Thus, the English concept of affray, according to Smith and Hogan,[14] does not simply refer to unlawful violence, but refers to all those acts or threats of unlawful violence accompanied by conduct that "is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety." This notwithstanding, the offence needn't be committed in a public place, and in fact no spectator need actually be present, but the possibility of fear being caused in the so-called "person of reasonable firmness" is still required.

It is also important to note that the two notions are so different that, under English law, for there to be affray, none other than the defendant need be responsible for the offence, so that, although it is necessary for there to be at least another person involved, as a victim of the defendant's unlawful violence or threats, it isn't even necessary to have two co-participants. The English offence of affray, therefore, isn't even a *'reato plurisoggettivo'*, one of the main characteristics of *rissa*.

In 1836, the Criminal law Project initiated by the Royal Commission of 1831 and terminated by that of 1832 was published. The greater part of it was Sir Ignazio Gavino Bonavita's work, and consisted, he reported, in a translation of the Neapolitan Code, corrected, where the need was felt, with the help of Sir Richardson's incomplete and never published project, and of the Ionian Code, which had also been modelled with corrections upon the Neapolitan Code (in its turn based on the French Penal Code).[15] The following is Art. 298 of Bonavita's *Progetto sul Codice Criminale di Malta*, Cap. 1, Sezione VI:

> Se in una rissa accidentale tra più individui seguisse un omicidio, od una grave offesa sulla persona, e s'ignorasse chi ne fosse l'autore, ciascuno che avesse preso una parte attiva nella rissa in opposizione della

> persona, che fosse rimasta uccisa, o gravemente offesa, sarà punita come segue.
>
> Nel case di omicidio la pena sarà quella stabilita pel colpevole di grave offesa.
>
> Nel caso di grave offesa, la pena sarà quella stabilita pel colpevole di lieve offesa.
>
> Chiunque però nel caso di omicidio contemplato in questo articolo avesse nella rissa inflitto una grave offesa sulla persona dell'ucciso, sarà punito con uno, o due gradi meno della pena cui soggiacerebbe il colpevole di omicidio volontario.

The project was published in 1836 under the name of *Leggi Penali*, and a period of time was allowed for public discussion. Unfortunately, this period was prolonged indefinitely due to various political circumstances, until finally it was decided to give the task of revising the text to Sir Andrew Jameson, who wrote and published his report in 1844. Jameson proposed the following modifications to the article corresponding to today's Section 237:[16]

> Art. 221. Clause 4th after the word "punishment" delete the word "shall" and insert the word "may" and add new clause as follows:
>
> > "These dispositions shall not apply to any person who excites "the affray for the purpose of committing homicide or great bodily harm and in "that case the offender shall be subject to the provisions of the Law with regard "to wilful homicide."

These modifications, introducing Sec. 238 in its original form, were included in the 1850 'White Paper' and subsequently in the 1854 Order-in-Council which enacted the Criminal Code. The first amendments came with Ordinance VIII of 1857, and concerned directly the provision introduced by Jameson:

> 8. The provision of the last paragraph of article 227 of the said laws *[the Criminal Code]*, is revoked and replaced as follows:
>
> "This provision shall not apply to any person, who provokes an affray or a quarrel for the purpose of committing homicide or of inflicting a severe bodily harm; and in such case the offender, if a homicide ensue, shall be punished with the punishment established for voluntary homicide, or if a bodily harm ensue, with a punishment established for such offence, with the increase of one degree."

The objective of this amendment is clear; whilst Jameson's provision, intentionally or perhaps otherwise, imposed the punishment applied for voluntary homicide even in cases where nothing more than bodily harm ensued, the amended provision imposed a proportionate punishment increased by one degree.

The next amendment was introduced in 1871, with Ordinance VI of that year. It dealt with Art. 227, today's Sec. 237, in the following provision:

> 18. After the second section of article 227 of the said laws, relative to the case of severe bodily harm, the following provision is adjoined:
>
> "In case of slight bodily harm, the punishments established for "contraventions shall be awarded."

It is unclear whether the case of slight bodily harm was left out by Sir I.G. Bonavita purposely, considering such a case would not be worth punishing, or accidentally. Whatever the case may be, the legislator seems to have forgotten to amend the opening provision in relation to the amendment, so that whilst the article started off by saying "If a homicide or a grievous bodily harm be committed ...", the rest of the article provided even for cases of slight bodily harm. This was adjusted in 1885, through Section 2 of Ordinance No. III:

> 2. The provision contained in the first paragraph of article 227 of the said laws, is revoked, and replaced as follows:

> "227. If a homicide or bodily harm shall occur in an accidental affray "between several individuals, and the actual perpetrator of the offence be "unknown, each person who shall have taken an active part in the affray, "against the deceased or against the person hurt, shall be punished as follows:
>
> "In case of homicide, the punishment shall be that established for severe "bodily harm;
>
> "In case of severe bodily harm, the punishment shall be that established "for slight bodily harm;
>
> "In case of slight bodily harm, the punishment established for "contraventions shall be awarded."

In 1900, Ordinance No. XI of the same year re-enacted Art. 227 in the form of two separate provisions, adding detail in regard to the punishments. Thus, the actual form was reached in the following manner:

> 35. The provision contained in article 227 of the said Laws is revoked, and the following are substituted therefor:
>
> "227. If a homicide or a bodily harm shall occur in an accidental affray, and the perpetrator of the offence be unknown, each person who shall have taken an active part against the deceased or against the party hurt, shall be punished;
>
> 1. In case of homicide, with imprisonment for a period not exceeding three years;
>
> 2. In case of grievous bodily harm which has produced the effects mentioned in article 209 *a*, with imprisonment for a period not exceeding one year;
>
> 3. In case of grievous bodily harm without the ef-

fects mentioned in the preceding number, with imprisonment for a term not exceeding three months;

4. In case of slight bodily harm, with the punishments established for contraventions.

"But whosoever shall, in case of homicide, have caused bodily harm on the person killed, wherefrom death might have ensued, shall be punished with hard labour from five to twelve years.

"227 *a*. Whosoever shall provoke a tumult or an affray for the purpose of committing homicide or causing bodily harm, shall be punished as follows:

1. If any person is killed, with the punishment established for wilful homicide;
2. If any person be hurt, with the punishments established for that offence increased by one degree."

One of the results of this amendment, the sole scope of which was probably to add detail to the punishments and to provide for the various forms of grievous bodily harm, was to exclude punishment in cases were the consequences amount to grievous bodily harm followed by death. However ridiculous it might seem to punish all those involved in a slight bodily harm, and not punish all those involved in a grievous bodily harm followed by death, the fact remains that such a case has nothing to do with wilful homicide, with grievous bodily harm aggravated by the circumstances mentioned under section 209 *a* or with simple grievous bodily harm. As grievous bodily harm followed by death is not mentioned, it cannot be implied as incorporated either in aggravated grievous bodily harm, as for this offence an exhaustive list of effects is provided by law, or in simple grievous bodily harm, especially since this offence is punished less severely than aggravated grievous bodily harm. And it has even much less to do with slight bodily harm. This can only lead to one logical conclusion; that the legislator here has made a very singular mistake, which would provide much food for thought if such a case were to be brought before the Courts.

The next amendment to be examined was a direct consequence of Act XLIX of 1981, which amended the Statute Law Revision Act of 1980. On the 5th

October, 1981, when the second reading of the Bill was proposed by the Hon. Joseph Cassar, and seconded by the Hon. Daniel Cremona, the former, *inter alia*, said, "Per ezempju, jekk niehdu l-emendi ghal dik li hija Kodici Kriminali, peress li l-Kodici Kriminali gie emendat ilu s-snin, fis-sens li nehhejna l-*hard labour*, baqghu xi ligijiet li jidhru l-kliem *"hard labour"*. Jigifieri dik ma taghmilx sens u allura l-Kummissjoni diga' bdiet, fejn tiltaqa' maghhom, tnehhihom." This was precisely the case with Sections 237 and 238.

Concluding Comments

The Maltese concept legal concept of *rissa* has as we have ssen a long tradition; unfortunately, though, it cannot be said that much effort has been made to keep it in line with modern legal theory. Our Constitution, in fact, provides that no collective punishment may be imposed; now, keeping in mind the fact that part of the *actus reus* contemplated under Section 237 is actually constituted by the mere *possibility* that the accused, killed or harmed a third party, as well as by the *concurring* fact that police investigations did not yield conclusive results, it is difficult to avoid the conclusion that Section 237 deals with a kind of "collective guilt". Of course, it may be argued that collective guilt does not amount to collective punishment, so that it is still possible for the judge or magistrate to take into consideration the circumstances of the participation of every single accused person independently from the rest. However, the wording of Article 36(3)(a) of the Constitution seems to exclude this; in fact it reads, "No *law* shall provide for the imposition of collective punishment." The fact that a judge or magistrate may award different punishments is a question of judicial discretion, and has nothing to do with determining whether the provisions of the law itself are *per se* providing for collective punishment or not.

The Italian Constitutional Court[17] has decided that the Italian provision is not contrary to Art. 27 of the Italian Constitution, which provides that *"La responsabilità penale è personale."* One must keep in mind the fact, however, that the Italian Constitutional provision is substantially different from the Maltese one, and in regard to *rissa* in itself, the bodily harm or homicide suffered by the victim of the brawl is under Italian formulated as an aggravating circumstance of the crime of *rissa*, and does not depend upon any external factor relative to the discovery of the actual perpetrator.

For these reasons, it is at present difficult not to entertain doubts as to the future of

Section 237. It could be amended according to the directives of Act XIX of 1991, in order to bring it in line with the provisions of the Constitution, a requirement from which it was previously exempt. On the other hand, it could be destined to be attacked and defeated on constitutional grounds, or even before the European Court of Human Rights; it could even survive both outcomes, depending upon the interpretation of Article 36(3)(a), which as seen, could exclude unconstitutionality. A further possibility is its remaining unnoticed till the next time our Criminal code is overhauled, which is what is probably bound to happen, eventually, if no case of the kind it envisages crops up in court. In any case, the student of Criminal Code will be bound to follow with interest any further developments of the concept of *rissa* as the latest events in a chequered legislative history.

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DR EMMANUEL MALLIA

L-ETIKA FIL-PROFESSJONI LEGALI[1]

Hafna minnkom huma l-avukati ta' ghada. Ohrajn minnkom, forsi diga' bhalna, jappartjenu lill-professjoni legali. Kollha kemm ahna ghandna d-dmir li nharsu l-isem tajjeb tal-professjoni.

Meta fil-qadi tad-dmirijiet professjonali taghna, xi avukat jonqos milli jhares skrupolozament, ir-regoli ta' etika, hu jkun fl-ewwel lok qed jaghmel hsara lilu nnifsu, u fit-tieni lok, ikun ta' pregudizzju ghall-professjoni, peress illi jkun qed inaqqas serjament il-fiducja pubblika li l-istess professjoni legali ghandha tgawdi.

Ghaliex tali avukat ikun qed jaghmel hsara lilu nnifsu? Apparti dawk il-konsegwenzi statutorji u legali li jista' jirrinfaccja, dak l-avukat ikun qed jibni ghalih, mhux fama izda notorjeta'. Il-kelma "etika", derivata mill-kelma Griega "*ethos*", fl-ewwel lok tirrigwarda il-komportament uman, u fit-tieni lok tirrigwarda l-valuri u "*standards*" relatati ma' l-istess komportament. Hu fatt, illi persuna tigi soggetta kontinwament ghall-gudizzju valutattiv ta' persuni ohra. Il-gudizzju etiku, tradizzjonalment, hu karatterizzat bil-mod kif ahna ngiebu ruhna ma' l-ohrajn. Ghalhekk l-istudju ta' l-etika hu maghmul minn principji jew "*standards*" li persuna taddotta, sabiex tasal ghall-gudizzju etiku fuq persuna ohra. Fl-isfond tas-suggett li qed niddiskutu, dan ifisser illi dan il-gudizzju etiku isir minn haddiehor fuq l-avukat, skond kif dan jikkonduci l-hajja professjonali tieghu f'kull aspett.

Il-fama ta' avukat ma tinkisibx biss ghax dak l-avukat ikun studjuz tal-ligi, b'hekk li ikun Ippreparat ghall-kazijiet tieghu. Dan hu aspett ferm importanti, izda l-gudizzju etiku isir fuq l-assjem tal-komportament professjonali ta' l-avukat. Huma ugwalment importanti l-aspetti tar-relazzjoni etika bejn l-avukat u l-klijent tieghu, tar-relazzjoni etika bejn l-avukat u l-kollegi avukati tieghu, kif ukoll l-aspett ta' rispett, lealta' u relazzjoni etika bejn l-avukat, li hu ufficjal tal-Qorti, u l-istess Qorti li jidher quddiemha.

L-avukat ghandu dejjem jaghti l-ahjar servizz lill-klijent tieghu. Sabiex jaghmel dan, hu ghandu jkun ippreperat, ghandu jistudja l-kaz li jkun gie fdat f'idejh, u jkun studja l-principji legali involuti fil-kaz. Hu zball kbir, jekk xi hadd jahseb illi l-fatt illi jkun iggradwa mill-Universita' u nghata l-"*warrant*" sabiex jezercita l-professjoni, illi allura m'ghandux bzonn jistudja aktar. Ir-risposta ghad-domanda jekk avukat ikunx studja sewwa l-kaz li jkun gie fdat lilu, itiha, fl-ewwel lok, l-istess avukat. L-avukat ikun jaf jekk ippreparax lilu nnifsu sew ghall-kaz. Ihoss, go fih, jekk xi ezami ta' xhud, xi trattazzjoni quddiem il-Qorti jew xi seduta fuq xoghol estragudizzjarju, ikunx ikkonduciha bl-ahjar abbilta' tieghu jew le, u jekk le li r-raguni ghal tali disfatta hi ghax kellu jkun ippreparat ahjar. Ma hemm xejn aktar umiljanti milli thossok taqa' ghac-cajt, billi ma tkunx studjajt jew ippreparajt kaz sew.

Jekk avukat ikunx studja l-kaz tieghu u jkun ippreparat, jigi nnotat ukoll mill-Gudikant, mill-klijent u minn min ikun jisimghek fl-Awla jew il-post fejn tkun. U jekk tali avukat jibqa' jippersisti b'dan l-attaggjament traskurat illi "*kollox jghaddi, ghalfejn nipprepara u nistudja l-kazijiet*", malajr tigri l-kelma, tibda tigi kalkolat bhala avukat ta' l-ahhar kategorija, u ma tgawdix minn dak ir-rispett professjonali la minn shabek, la mill-Gudikanti u lanqas mill-klijenti, jekk ikun fadallek.

Mhux l-istess ikun il-kaz jekk l-avukat jibni ghalih fama illi hu jkun ippreparat ghall-kazijiet tieghu. Fl-ewwel lok, tali avukat ihoss soddisfazzjon personali, il-klijent japprezza tali servizz prestat u hafna drabi jikkongratulah; shabu li jkunu fl-awla qeghdin jisimghuh ikunu favorevolment impressjonati (hlief dawk li jaraw b'gelozija professjonali "*their failure in your success*") u l-Gudikant jinduna illi l-avukat ikun studja sew il-kaz. Maz-zmien, minn esperjenza ta' kaz ghall-iehor, tali avukat ikun qed jibni fama ghalih innifsu u ghall-prattika professjonali tieghu. Is-success ma jigix, kif forsi jahsbu xi whud, minn serje ta' kumbinazzjonijiet. Is-success ta' karriera professjonali jigi mill-istudju tal-ligi, minn hafna sagrificcji u minn dedikazzjoni shiha fix-xoghol professjonali tieghek.

Diego Maradona kien "player" tal-"football" hafna tajjeb. Ma hemmx dubju dwar dan. Izda dan ma jfissirx illi Maradona kien ragel tajjeb. Kif diga` rajna, mhux biss l-avukat ghandu jibqa' studjuz assidwu tal-ligi, izda wkoll illi l-komportament tieghu ikun etiku versu l-klijenti tieghu, il-kollegi tieghu u l-Qorti.

Fil-fatt jiena gejt mitlub mill-Law Society, illi nindirizzakom dwar l-etika ta' l-avukat fir-relazzjonijiet tieghu ma' avukati ohra u fir-relazzjonijiet tieghu mal-klijenti.

Nibda minn ta' l-ahhar, cioe' il-valuri u regoli etici fir-relazzjoni ta' l-avukat mal-klijent. Hafna mill-ezempji li nista' nsemmi, jistghu ikunu frott ta' esperjenzi personali tieghi. Fil-bidu tal-karriera tista' facilment taqa' f'certi trappoli. Nispera illi din il-"paper" tghin biex jiftiehmu ahjar certi principji ta' etika professjonali.

1. Principji ta' Etika rigwardanti ir-relazzjoni bejn l-avukat u l-klijent tieghu.

[1.a] Kif jigu accettati l-inkarigi.

Fil-prattika gieli jigri, illi jigik xi hadd l-ufficcju, sabiex isaqsik ghal xi parir legali li jkollu bzonn haddiehor. Hawn trid toqghod attent. Jekk il-parir ikun fuq principji generali tal-ligi, ma hemm xejn hazin li dan il-parir legali jinghata. Xi minn daqqiet, pero', il-persuna li tigi titolbok parir ghal haddiehor, ikollha skopijiet ulterjuri. Tibda ittik ipotezijiet b'fatti u cirkostanzi ta' kaz illi tkun diga' involut fih ghan-nom tal-klijent tieghek. L-iskop tal-persuna illi tkun baghtet lill-iehor sabiex tiehu dak il-parir, ikun biex issir taf kif tahsibha inti fuq il-kaz, illi possibilment hija tkun involuta fih mal-klijent tieghek. L-ahjar haga li sibt meta f'kaz bhal dan il-parir mitlub mill-mandatarju ikun wiehed specifiku ghal fatti specifici, hu li titlob lil dik il-persuna illi jkun ahjar illi tkellem lil vera klijent, ghaliex hu jkun jista' jtik il-fatti ezatti.

Jigri wkoll illi jista' jigik l-ufficcju persuna illi, flimkien ma' ohrajn, ikollu interess fil-parir li jkun qed jitolbok, pero' jinformak illi l-ohrajn ikunu baghtu lilu peress illi ma setghux jigu l-ufficcju. F'dan il-kaz, il-parir ikun jista' jinghata, pero' jekk l-avukat ikun ser jipprezenta xi att gudizzjarju ghan-nom ta' dawk l-ohrajn li ma jkunux gew l-ufficcju, hu rakkomandabbli illi dawk l-ohrajn li ghan-nom taghhom ikun ser jagixxi, jiformalizzaw l-inkarigu li jkunu qed ituh. Jekk dan ma jsirx, jista' jkollok xi persuna, illi fil-futur, ghall-skopijiet taghha, tghid illi hi qatt ma tkun taghtek dak l-inkarigu.

Jista' jkollok ukoll persuni illi ma tkunx tafhom, jiguk l-ufficcju jew isibuk il-

Qorti sabiex tiffirmalhom ir-ritratti u formoli tal-passaporti, jew xi applikazzjoni tal-licenzja tas-sewqan. Jibdew ighidulek illi l-mama' tieghek tafhom sew u illi huma jafuk zghir. Jekk ma tkunx tafhom ghall-perjodu stabbilit mir-regolamenti legali, m'ghandek qatt tiffirma tali formoli. Dawn jibqghu jiffittawk, pero' ghandek tispjegalhom, bil-prudenza, x'tghid il-ligi, u li ma tkunx serju, etiku u professjonali jekk taghmel dan.

Jista' jigik xi hadd l-ufficcju illi jkun qed jitolbok sabiex tiffirma dokument bhala xhud tal-firma u identita' ta' xi hadd, meta dak ix-xi hadd ma jkunx prezenti u ma jkunx qed jiffirma quddiemek. Din it-talba ghandha tigi dejjem rifjutata, anke jekk tkun taghraf sew il-firma in kwistjoni jew dak ix-xi hadd tkun tafu. Ir-raguni ghaliex m'ghandek qatt taghmel dan, hi ovvja.

Regola 1, Kapitolu 2 tal-Kodici ta' Etika u Mgieba ghall-avukati jistabilixxi l-principju generali illi avukat hu liberu, jaccettax jew le inkarigu minn klijent partikolari. Bir-rispett, nahseb illi avukat ghandu jkollu raguni legittima ghalfejn jirrifjuta illi jaghti s-servizzi legali tieghu lill-klijent partikolari illi jkun lest ihallsu ta' tali servizzi. Jekk, per ezempju, l-avukat jinduna illi xi inkarigu jista' jgib mieghu ksur tal-ligi jew tal-Kodici ta' l-Etika, wiehed jifhem illi avukat ghandu jirrifjuta l-inkarigu. Izda meta ma jkunx hemm tali impediment legali, hu ferm difficli li wiehed jifhem tali rifjut. F'dan ir-rigward, hafna drabi gie ritenut, illi avukati m'ghandhomx jiddefendu persuni imputati b'certi delitti stipulati fil-Kapitolu 101 tal-Ligijiet ta' Malta. Jiena, personalment, ma naqbilx ma' min jirritjeni dan, anke meta l-avukat in kwistjoni ikun ukoll politiku. Fl-ewwel lok, il-persuna akkuzata hija prezunta innocenti; fit-tieni lok l-avukat illi qed jiddefendi tali kazijiet ma jfissirx illi hu favur l-abbuz tad-droga; mhux qed jiddefendi d-delitt izda lil persuna imputata b'dak id-delitt. Min qieghed jiddefendi kaz ta' omicidju volontarju, ma jfissirx illi hu favur id-delitt ta' omicidju, izda jfisser illi qed jiddefendi persuna akkuzata b'dak id-delitt, skond il-ligi. Hu veru illi Regola 3 tal-Kodici imsemmi tghid illi:-

> "Avukat ghandu jirrifjuta inkarigu jew m'ghandux ikompli bl-inkarigu meta jaf li ma jistax jaqdih bil-kompetenza u bl-attenzjoni necessarja ghall-kaz."

Din ir-regola, pero', m'ghandix isservi bhala skapattoia sabiex avukat ikollu skuza sabiex ma jaccettax jew ikompli b'inkarigu. Fil-hajja professjonali, tista' tigi mitlub taccetta kazijiet, partikolarment fil-kamp penali, li jkunu ikkrejaw

certa pubblicita' avversa fil-pajjiz, jew li l-parti leza tkun persuna importanti jew ta' kariga. L-indipendenza professjonali ta' l-avukat hija sagrosanta, u l-avukat ghandu jkollu l-kuragg illi jekk ma jkun hemm l-ebda impediment legali, li jaccetta inkarigi diffikoltuzi u skabruzi, ikunu kemm ikunu tali, u jkunu x'ikunu l-effetti, li tali persuni lezi jew effettwati jkunu jistghu jikkreawlek bhala konsegwenzi.

Il-Kodici ta' Etika jippostula l-kaz ta' meta socju f'ditta ikun avukat ta' parti, u socju iehor fl-istess assocjazzjoni ta' avukati, ikun avukat tal-parti l-ohra, fl-istess kaz. Regola 8 tghid illi tali inkarigu ghandu jigi rifjutat jekk dan jista' jgibu in konflitt ta' interessi ma' socju. Din nahseb li hija l-pozizzjoni korretta, ghaliex il-klient ghandu jkun f'pozizzjoni illi f'mohhu ma jidhollu qatt id-dubju illi fl-istess ufficju ta' ditta ta' avukati, jistghu jigu pregudikati xi drittijiet tieghu fil-kaz. Id-ditta ta' l-avukati jista' jkollha, kif normalment ikollha, segretarjat wiehed, u anke dan il-fatt, fih innifsu, jista' johloq problemi ta' kunfidenzjalita', li l-klient jistenna minghand l-avukat tieghu.

Punt iehor li l-avukat jiltaqa' mieghu spiss fil-prattika, hu meta klient jigih l-ufficju biex jikkonsulta ruhu dwar kaz li diga' jkun gie fdat lil avukat iehor. F'dawn ic-cirkostanzi, avukat mhux dejjem jinduna mill-ewwel illi dan ikun il-kaz, partikolarment, meta l-klient joqghod attent biex ma jtikx hafna dettalji dwar xi jkun diga' ghamel gudizzjarjament, biex jara jekk il-parir li jkun tah l-avukat l-iehor, ikunx korrett. Meta pero', l-avukat jinduna, u f'hafna kazijiet jista' jinduna facilment, jekk jistaqsi certu domandi, li l-kaz hu f'idejn avukat iehor, hu ma ghandu qatt jaccetta l-inkarigu, jekk ma jkunx cert li l-avukat l-iehor gie mhallas skond il-Ligi, meta ittermina l-inkarigu. Regola 8 tal-Kapitolu 2 tikkrea norma illi f'certi cirkostanzi eccezzjonali, meta hekk titlob l-urgenza, u biex ma jigux pregudikati l-interessi tal-klient, hu jista' jassumi l-inkarigu, basta javza lill-avukat l-iehor. Il-Kamra ta' l-Avukati, fi kwalunkwe' kaz, tista', jekk jidhrilha xieraq, li tawtorizza lit-tieni avukat jaccetta l-inkarigu.

[1.b] Dmirijiet lejn il-Klient matul l-Inkarigu.

Il-klient imur ghand l-avukat ghaliex ikun irid assistenza legali. Hu jkun jaf, li min-natura professjonali, l-avukat ghandu l-obbligu tal-kunfidenzjalita'. Din il-fiducja ma ghandha qatt tigi tradita, ghaliex din hi proprju l-bazi tar-relazzjoni bejn l-avukat u l-klient. Tant hu hekk, illi bl-Artikolu 642(1) tal-Kodici

Kriminali, l-avukat ma jistax jigi mgieghel jixhed fuq hwejjeg li jkun gie jaf bihom minhabba li l-parti stess ikunu fdaw fil-patrocinju jew konsult tieghu. Din hi protezzjoni li taghti l-Ligi, li qieghda tissalvagwardja li dak li jintqal lill-avukat b'kunfidenzjalita', hu meqjus bhala sigriet professjonali.

F'dan ir-rigward, hemm bzonn illi jigu ccarati certa pozizzjoni li ghandu l-avukat, in vista ta' certi emendi illi saru dan l-ahhar. L-avukat li jkun qieghed f'konverzazzjoni telefonika mal-klient tieghu, li jkun detenut fil-Facilita' Korrettiva ta' Kordin, jistghu hemmhekk jissemmghu din il-konverzazzjoni? In vista ta' kaz ricenti, fejn l-Awtorita' tal-Habs irrekordjaw konverzazzjoni bejn detenut u martu, li wara ngiebet bhala prova fil-kaz, jista' jpoggi l-kunfidenzjalita' bejn l-avukat u d-detenut, klient tieghu, f'certu dubju. L-istess ghandu jinghad ghal *telephone tapping*, li f'certi kazijiet hu, illum, legalment permess. Id-domanda hija: jistghu s-servizzi tat-telefon f'ufficju ta' avukat jigu tapped? Ninkoraggixxi lill-Law Society sabiex torganizza dibattitu dwar dan, ghaliex dan serjament jeffettwa l-kunfidenzjalita' professjonali bejn l-avukat u l-klient.

Fil-prattika, jigri illi jista' jkollok klient illi jkun irid jagixxi ta' avukat hu, u jghid lill-avukat x'ghandu x'jaghmel. Il-klient, bhal bnedmin ohra, jista' jkun twajjeb, krudil, ingenwu, makakk jew addirittura, ikollu xi kwalita' negattiva ohra. Ghal tali klienti, l-avukat irid joqghod ferm attent. Ma ghandu qatt jippermetti lill-klient jiddettalu x'ghandu x'jaghmel hu, u x'ghandhom ikunu d-dmirijiet professjonali tieghu, partikolarment meta dak li jkun qieghed jesigi tali klient difficli, ikun illecitu jew sahansitra illegali. Issib, fil-prattika, illi jista' jkollok xi klienti li jiguk l-ufficju, illi jahsbu illi bil-flus jistghu jibnu triq fil-bahar. Jibdew jinsinwaw hafna affarijiet biex ikollhom success fil-kaz taghhom. Lil tali klienti trid iggibhom f'posthom mill-ewwel, u b'fermezza tghidilhom illi dak li setghu kienu jahsbu erroneament, bazat fuq qlajjiet ingustifikati ta' nies irresponsabbli, mhix realta' fis-saltna tad-Dritt.

Jista' wkoll ikollok klienti li jipprovaw ipingulek stampa sabiha, billi jipprovaw joffrulek sehem minn xi ammont li huma jistghu jakkwistaw bhala rizultat ta' rebh tal-kaz. L-avukat qatt m'ghandu jaqa' f'din it-tentazzjoni. Mhux permess, la b'mod dirett u lanqas indirett, li jaghmel ftehim jew stipulazzjoni *quotae litis*.

Il-klient li jitlob l-assistenza legali lill-avukat ikun irid jigi, fl-ewwel lok, mismugh mill-avukat. L-avukat, ghalhekk, ghandu jiddedika l-hin necessarju

ghall-klient, u hafna drabi jkollu l-pacenzja li jisma'. Ghalkemm, f'ghajnejn l-avukat, il-kaz tal-klient ikun jidher insinifikanti, ghall-klient, il-kaz tieghu jkun meqjus minnu bhala importanti. F'artikolu illi deher fl-American Bar Association Journal ta' xi xahrejn ilu, jintqal illi huwa ferm importanti, anke mill-aspett psikologiku, illi l-klient ihossu qieghed jinghata servizz, u jithalla jfisser lill-avukat, fit-tul li jixtieq, il-fatti u c-cirkostanzi tal-kaz tieghu. Hu fatt innegabbli illi hafna drabi, l-avukat, minhabba l-esperjenza li jkollu, ikun jinteressah biss li jigu spjegati lilu, il-fatti rilevanti tal-kaz. Mhux l-ewwel darba, illi l-klient jigi mwaqqaf, billi aktar ikun irid jitkellem l-avukat, milli jisma' lill-klient.

Punt importantissimu f'dan ir-rigward tar-relazzjoni professjonali u etika bejn l-avukat u l-klient, hu dak li jiddisponu l-Artikoli 571(1), u 122 u 123 tal-Kodici Kriminali. L-Artikolu 571(1) jaqra hekk:-

> "Jekk avukat li jkun ha f'idejh id-difiza ta' aktar minn akkuzat wiehed, isib illi d-difiza ta' wiehed jew ta' aktar mill-akkuzati, mhix kompatibbli ma' l-interessi ta' wiehed jew aktar mill-akkuzati l-ohra, hu ghandu jitlaq minnufih id-difiza ta' dak jew ta' dawk mill-akkuzati illi ma tkunx kompatibbli mad-difiza ta' dak jew ta' dawk mill-akkuzati l-ohra li jkun behsiebu jzomm f'idejh."

Meta avukat jinghata l-inkarigu, normalment, anke jekk ikun hemm diversi indagati li sussegwentement jitressqu l-Qorti bhala ko-akkuzati, ikollu biss wiehed illi jkun avvicinah biex jafdalu l-inkarigu. F'dan il-kaz, jekk sussegwentement, ikun hemm wiehed mill-ko-akkuzati l-ohra li wkoll javvicinah biex jassumi l-patrocinju ghalih ukoll, l-avukat ikollu, f'dak l-istadju idea tajba dwar l-akkuzi u l-fatti tal-kaz, u jkun jista' facilment jiddeciedi jekk hemmx konflitt ta' interess jew le. Jista' jigri, pero', illi l-familjari ta' l-indagati, li allura f'dak l-istadju jkunu detenuti, imorru l-ufficju ta' l-avukat, f'daqqa. Jekk ma jmorrux f'daqqa, ma tinqala' l-ebda problema, ghaliex normalment, li jigri hu, li min jigi jikkonsultak l-ewwel, izzomm lilu bhala klient u mhux lill-ohrajn. Meta jigu, pero', f'daqqa, ikun opportun illi l-avukat jispjega, sa minn dak l-istadju, li jista' jkun hemm konflitt ta' interess.

L-avukat fil-bidu tal-karriera tieghu jista' jaqa' fit-tentazzjoni illi ggaghlu jaccetta, ghall-gwadann finanzjarju, aktar minn ko-akkuzat jew klient wiehed, minghajr ma jifli sew jekk ikunx hemm realment konflitt ta' interess. L-avukat

ghandu dejjem jiftakar illi hu professjonist, u mhux negozjant. In-negozjant mill-ewwel jara l-interessi finanzjarji tieghu, mentri l-professjonist irid l-ewwel jassigura l-interessi tal-klient, u l-aspett finanzjarju jitqies wara.

L-Artikolu 122 tal-Kodici Kriminali jghid hekk:-

> "L-avukat jew il-prokuratur legali illi, wara li jkun ga` beda jiddefendi wahda mill-partijiet, fl-istess kawza, jew f'kawza ohra li fiha tkun imdahhla l-istess kwistjoni u interess, ighaddi, kontra l-istess parti, jew kontra l-persuni li jkollhom jeddijiet minnha, minghajr il-kunsens ta' dik il-parti jew ta' dawk il-persuni, ghad-difiza tal-parti l-ohra, jehel, meta jinsab hati, il-piena tal-multa, u l-interdizzjoni temporanja mill-ezercizzju tal-professjoni tieghu, ghal zmien minn erba' xhur sa sena."

Dan l-abbuz mill-avukat hu meqjus bhala delitt mill-Ligi Penali taghna. Il-Ligi trid ukoll tassigura illi l-avukat fl-ezercizzju tad-dmirijiet tieghu ma jabbuzax mill-klient kontra l-interessi tieghu. Infatti, l-Artikolu 123 tal-Kodici Kriminali jirriferixxi ghat-tradiment ta' l-interessi tal-klient mill-avukat. Ighid hekk:-

> "(1) L-avukat jew il-prokuratur legali li jittradixxi l-interessi tal-klient tieghu, b'mod illi, minhabba l-ghemil jew nuqqas qarrieqi tieghu, il-klient jitlef il-kawza, jew jitlef xi jedd bil-preskrizzjoni, jehel, meta jinstab hati, il-piena ta' prigunerija minn seba' xhur sa tmintax-il xahar, u l-interdizzjoni perpetwa mill-ezercizzju tal-professjoni tieghu."

Punti ohrajn li nhoss li ghandi nsemmi brevement, huma meta l-avukat jigi mitlub ikun depozitarju ta' xi flus li l-klient, u anke f'certi kazijiet, il-parti l-ohra, jitolbuh izomm ghandu. F'tali sitwazzjonijiet, l-avukat ghandu, fl-ewwel lok jassigura li s-somma depozitata ghandu jkollha skop u raguni lecita, u fit-tieni lok, li din tinzamm f'kont jew depozitu bankarju. L-avukat ghandu dejjem jiftakar illi jekk xi haga jew somma li tigi fdata lilu, isir minnha uzu differenti minn dak moghti, l-avukat jista' jkun soggett biex iwiegeb ghad-delitt ta' approprjazzjoni indebita, anke bl-aggravju li tikkontempla l-Ligi.

Il-punt l-iehor hu l-preparazzjoni tal-klient biex jiddeponi l-Qorti, kif ukoll il-

preparazzjoni tax-xhieda li hu behsiebu jressaq fil-kaz. Issib, fil-prattika, lil hafna minn dawn ix-xhieda li meta tkellimhom l-ufficju, ighidulek "*kif tghidli int, nghid*". L-avukat ghandu mill-ewwel jispjega lil tali persuna li dak li qed jigi mitlub minnu, hu skorrett u illegali. Ebda avukat ma ghandu jghid lil xi hadd x'jixhed, izda ghandu jghinu kif ghandu jispjega fit-testimonjanza tieghu, il-verita` tal-fatti. L-ezami jew il-kontro-ezami tax-xhieda hija arti. Id-domandi jsiru, mhux biex tisma' lehnek il-Qorti, izda sabiex tohrog certi *facts in issue* illi l-avukat jista' juza favorevolment fit-trattazzjoni finali tal-kaz. Ghalhekk l-importanza tal-preparazzjoni tax-xhieda.

2. Principji ta' Etika rigwardanti ir-relazzjoni bejn l-avukat u l-avukati kollegi tieghu.

Sew jekk l-avukat avversarju jkun avukat tar-Repubblika ta' Malta, jew avukati ohrajn fl-ezercizzju tal-prattika privata, l-avukat ghandu jifhem illi dawn, fil-funzjoni li jkunu qeghdin jezercitaw, ikunu qeghdin jagixxu fl-ahjar interess tal-klient taghhom. Dan qed jinghad, ghaliex fil-bidu tal-karriera professjonali, l-avukat itendi illi jinterpreta l-kaz, b'mod personali. Ma jkollux l-esperjenza necessarja illi jkollu s-sabar jisma' t-trattazzjoni tal-kollega li jkun qed jidher ghall-parti l-ohra. Jista' jigri wkoll, li hafna drabi, jibda jinterrompih, u fil-battibekki li jinqalghu, tista' anke tisma' kummenti ta' natura personali, ghaddejjin bejn avukat u iehor. Dan ma ghandux ikun. Il-korrettezza, kortesija u lealta' professjonali bejn il-kollegi hija ferm importanti.

Jista' jigri wkoll, fil-prattika, illi l-klienti ta' l-avukat, ghaliex jaraw li l-avukat tal-parti l-ohra ikun tajjeb f'xogholu fl-interessi tal-klient tieghu, jibdew ighaddu kummenti biex imaqdru lil dak l-avukat l-iehor. Avukat, in lealta' mal-kollega tieghu, ghandu jwiddeb mill-ewwel lill-klient tieghu, u jfissirlu li l-avukat l-iehor qieghed jaghmel xogholu skond il-Ligi. Avukat m'ghandu qatt, biex jidher sabih mal-klient, jinkoraggixxi lill-klient biex imaqdar jew ighid kontra avukat iehor.

F'certu sens, f'kawzi kriminali quddiem il-Qorti Istruttorja jew il-Qorti tal-Magistrati bhala Qorti ta' Gudikatura Kriminali, il-Pulizija Ezekuttiva bhala prosekuturi, huma wkoll kollegi. Jista' jigri illi jkollok xi spettur tal-Pulizija li jkun qieghed jinvestiga xi kaz, li jibda jhajjrek biex ighaddilek xi kazijiet. F'uhud minnhom anke forsi jissuggerixxi li jekk il-klient li jkun ghaddielek jammetti, ma jinsistix ghal xi sentenza karcerarja. Avukat ma ghandu qatt

jaqa' f'din in-nasba, u anke r-regoli tal-Kodici, ma jippermettux dan.

Fir-relazzjonijiet li jkollok ma' avukati ohrajn, jista' jigri illi, xi kultant, wara li tkun ikkonsultajt mal-klient, taghti l-kelma tieghek u l-assikurazzjoni lill-avukat l-iehor, minn xi stat ta' fatt. Tista', per ezempju, tassikurah illi l-flus reklamati mill-klient tieghu, qeghdin ghandek. Avukat ghandu dejjem jara illi l-assikurazzjoni li jaghti avukat iehor, hija veritjera. Ma jistax, per ezempju, fil-kaz li gibna, ighidlu li jkollu l-flus ghandu, l-avukat l-iehor icedi l-kawza, u l-fatt li jkollu l-flus ghandu, ma jkunx veru.

Regola 2 tal-Kapitolu 2 tal-Kodici ta' Etika jistipola li avukat m'ghandux jitratta direttament ma' parti ohra, meta din il-parti tkun qabbdet avukat, hlief bil-kunsens ta' l-istess avukat. Jista' jigri, fil-prattika, illi inti tkun qed tikteb lill-avukat tal-parti l-ohra, pero' dan, ghal xi raguni jew ohra, jibqa' ma jwiegbekx fi zmien ragonevoli. F'din l-eventwalita', il-Kodici ta' Etika jaghti d-dritt lill-avukat li jikteb direttament lill-parti l-ohra.

Finalment, kull avukat huwa fid-dmir li jirrapporta lill-Kamra ta' l-Avukati kull ksur serju tal-Kodici minn avukat iehor.

Nispera illi koprejt hafna mill-punti relevanti tas-suggett, u nistenna illi fiz-zmien ta' diskussjoni, ikun hemm domandi fejn inkunu nistghu nespandu aktar.

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